United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

77-7229

UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANTONIO MARRALE,

Plaintiff-Appellee,

against

CIA MAR DE NAV LLOYD BRASILIERO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

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7/6/76	Answer filed
3/29/77	Before Weinstein, J., trial by jury commenced
3/30/77	Trial continued - Verdict on liability only
4/1/77	Trial continued - Verdict for plaintiff in the amount of $70,000
4/4/77	Judgment entered
5/4/77	Notice of Appeal filed

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- x

ANTONIO MARRALE, :

Plaintiff, :

- against - :

CIA MAR de NAV LLOYD BRASILIERO, :

Defendant. :

---------- x

NOTICE OF APPEAL

76 C 359(JBW)

PLEASE TAKE NOTICE that the defendant CIA MAR de NAV LLOYD BRASILIERO, hereby appeals to the United States Court of Appeals for the Second Circuit from the Final Judgment entered in this action on the 4th day of April, 1977 and from each and every part thereof.

Dated: New York, New York
May 4, 1977

CICHANOWICZ * CALLAN

By_____
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JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF NEW YORK

Filed

ANTHONY MARRALE

vs.

CIA MAR DE NAV

CIVIL ACTION FILE NO.

P.M.

JUDGMENT

76 C 359

M'FILMED

This action came on for trial before the Court and a jury, Honorable Jack B. Weinstein, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, in favor of the plaintiff

It is Ordered and Adjudged that the defendant CIA MAR DE NAV pay to the plaintiff ANTHONY MARRALE the sum of $75,000.00 together with costs as taxed.

Dated at Brooklyn, New York, this 1st day of April, 19 77.

Leslie Vogel

Clerk of Court

By Ralph Sacco

Courtroom Deputy

UNITED STATES OF AMERICA

EASTERN DISTRICT OF NEW YORK

----------x

ANTONIO MARRALE,

Plaintiff,

- against -

CIA MAR DE NAV,

Defendant.

----------x

76 C 359

United States Courthouse
Brooklyn, New York

March 29th, 1977

B e f o r e :

HONORABLE JACOB WEINSTEIN, U.S.D.J.

DOLORES OLARNICK
ACTING OFFICIAL COURT REPORTER

1 Appearances:

2

MICHAEL KORSON, ESQ.,
3 Attorney for the Plaintiff.

4 GEORGE DELANEY, ESQ.,
Attorney for the Defendant.

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THE COURT CLERK: Case on trial, Antonio Marrale against Cia Mar De Nav Lloyd Brazilio.

THE COURT: Gentlemen, are we ready to proceed?

MR. KORSON: Yes, your Honor.

MR. DELANEY: Yes.

THE COURT: Bring in a jury.

(Whereupon, a panel of six jurors plus two alternates were duly impaneled and sworn, opening statements were made by Mr. Korson and Mr. Delaney, and the following occurred:)

THE COURT: Call your first witness.

MR. KORSON: I call the plaintiff, Antonio Marrale, to the witness stand.

THE COURT: Swear in the interpreter.

(Whereupon, the Court interpreter, Anthony Amarante, was sworn by the clerk of the Court.)

A N T O N I O M A R R A L E, having been first duly sworn, by the Clerk of the Court, was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. KORSON:

Q What is your address?

(Whereupon, the following answers were given by the plaintiff, Antonio Marrale, to an official court interpreter, Anthony Amarante.)

A 494 Henry Street, Brooklyn, New York.

Q What is your age?

A 51 and a half years old, going on 52.

Q What is your date of birth?

A The 9th of June, 1925.

Q Where were you born?

A Licata.

Q In Italy?

A Yes, Sicily.

Q Are you now a citizen of the United States?

A Yes.

Q When did you become a citizen?

A About two years ago.

Q Do you speak any English?

A Word or so, something like that.

Q Do you read or write in any English?

A Very little, a few words or so.

Q Mr. Marrale, are you married?

A Yes.

Q Is that your wife sitting over there?

A Yes.

Q Do you have any children?

A Two.

Q Do they both live with you?

A Yes.

Q What is your occupation?

A I work as a longshoreman.

Q How many years have you worked as a longshoreman?

A Eight.

Q Do you have any particular work category?

A Yes, holdman.

Q As a holdman, you were the man who works down in the lower deck of a ship?

A Yes.

Q As a holdman, are you a member of a regular gang?

A Yes.

Q What is the name of your hatch boss?

A Bosco.

Q What is his first name?

A I think it's Michael.

Q How long have you been in Mr. Bosco's gang?

A About seven years.

Q On May 31st, 1973, or thereabouts, were you working with Mr. Bosco's gang when you had an injury of some sort?

A Yes.

Q What pier were you working on that day?

A Pier 10.

Q In Brooklyn?

A Yes.

Q What stevedoring company were you working for?

A Pittston.

Q Working for Pittston that day, did you work on one particular ship?

A Yes, I worked on one ship.

Q Do you recall the name of that ship?

A No, I don't remember.

Q Do you know the name of the owner of the ship or the nationality?

A Spanish type ship.

Q You had worked on that ship the day before?

A No.

Q And on this particular day, what time did you start working?

A 8:00 .

Q Is that the usual starting time?

A Yes.

Q What hatch did you go to at 8 o'clock.

A Number two.

Q When you went to the number two hatch what deck level did you go to?

A Second deck, I was working on the second deck.

Q Was the hatch open when you got there?

A She was half open and half of it was closed.

Q Did you know the reason that it was half closed?

A Because there was cargo in that hatch.

Q On the main deck?

A On the main deck and on the second deck, yes.

Q When you went down to the second deck were you supposed to load or discharge?

A Load.

Q Do you remember what kind of cargo?

A General cargo.

Q What was used to load that cargo?

A At that time?

Q What type of equipment was used?

A We were using pallets, wires, skids, all kinds of gear with general cargo.

Q Were any machines used?

A Yes.

Q What type of machines?

A A gas machine.

Q Is there a name for that machine?

A They have a number of them, but who can remember the number.

Q No--I don't mean the specific machine to

identify it; I mean what do you call that type of a machine?

A In Italian we call it a machine.

Q What does that machine do?

A Picks up the cargo, places the cargo where it goes, where it's to be stowed.

Q What does it look like?

A She has two blades like this (Indicating) which picks up the cargo and raises the cargo.

Q Did you work in the hatch the entire morning?

A Yes,

Q That is until 12 o'clock?

A Yes.

Q Were any problems encountered that morning?

A The problem was there was smoke down in the hole.

Q Was there anything done to overcome that?

A Yes, we started to yell up on deck saying that somebody should come down.

Somebody said somebody was coming, but nobody came.

Q Were any blowers used in the hatch?

A Yes, blowers were there.

Q Describe what they looked like?

A The blowers were not functioning, were not working.

Q You say they were not working.

Do you mean they weren't working at all or they weren't

working well?

A They were not working at all.

Q Were they changed?

A No.

Q How were they supposed to work?

A This works by electric. This works with electrical current off the vessel which the vessel has.

Q What does the blower look like?

A When she works, she works well because it brings in fresh air and the stale air goes out.

Q What does it look like?

A You have a motor up on top and then you have something like a cloth which hangs from it and runs down with a pipe.

Q Who does it belong to?

A The company, Pittston, or the ship.

Q Pittston is the company that you worked for?

A On that day, yes.

Q Did it belong to them?

A Yes, I think it belonged to them.

Q Where is it connected on deck?

A She is secured to the hatch and she runs down and she is connected up on the deck.

Q Now, you told us earlier that you had made

complaints. To whom did you make the complaints?

A The people up on the deck, wecomplained to the people up there.

Q Who was on deck?

A The deckman.

Q Was anybody else on deck?

A The boss passed, they come and go.

Q Were there any shipmates on the deck?

A Yes, there was one or two.

Q Were any mates present when complaints were made?

A I don't remember whether he was an officer or a sailor, I don't know them.

Q Whoever he was, was he present when the complaints were made?

A Yes, he was there. Somebody came down into the hatch and saw that the thing was not working and then left.

Q This person that you are talking about is he a longshoreman?

A No, he is a sailor.

Q Did he say anything?

A No, he didn't say anything to us.

Q Did the fumes effect you at all?

A Yes, it was bothering me, but I continued to work.

Q In what way did it bother you?

A It made me dizzy and it made me feel somewhat suffocating.

Q Was anybody in the hatch coughing?

A Yes, somebody was coughing.

Q Did you work in the same hatch in the afternoon?

A In the afternoon we went down in the hole, yes.

Q Was it the same hatch?

A Yes.

Q How long was the lunch break?

A One hour.

Q Was that from 12 o'clock until one o'clock?

A Yes.

Q During the lunch hour did you remain on the ship or did you go off the ship?

A No, I left the ship.

Q Did the rest of the gang leave the ship?

A Yes, everybody went out.

Q When you returned to the hatch, what time did you remain there until?

A Up until seven o'clock at night.

Q How many times was the HiLo changed that day?

A They changed the machine at least two or three times that day.

Q Did that hatch have a ventilating system of its

own which is part of the ship as distinguished from the blower?

A Yes, they have it. All of these types of vessels have them.

Q Do you know if that was working that day?

A No, she was not working.

Q When the HiLo's were changed two or three times that day, did it effect the amount of fumes that were coming into the hatch?

A Yes, there was a lot of smoke.

Q When the HiLo's were changed was the smoke getting less, the same or more?

A During the time that they would change the machines a half hour or so then the fumes would lessen somewhat.

Q How did you feel as the day progressed?

A I told you, I didn't feel well, my head was spinning.

Q You worked on other ships before that with HiLo's?

A Yes.

Q Had you ever experienced that difficulty before as far as your feelings were concerned?

A No.

Q Had you ever worked with half a hatch open before

when a HiLo was being used?

A Yes, sometimes maybe an hour or so they would let us work there.

Q What would they do after an hour or so?

A They would have us change hatches.

Q Did you change hatches at all on that day?

A No.

Q Have you worked with other types of HiLo's before?

A Yes, with some other HiLo's which have some other type of gas line.

Q Did they have HiLo's that didn't use gasoline?

MR. DELANEY: Objection, I will object to any further types of HiLo's. He has established what type of HiLo and he said it was in the hatch that day --

THE COURT: I will permit it.

BY MR. KORSON:

Q You may answer.

A Yes, there are HiLo's that do not use gasoline.

Q What type of power do they work on?

A I cannot figure that out; I don't know what kind of power.

Q Do you know if there are any electric HiLo's?

A Yes.

Q Were electric HiLo's being used at that time

elsewhere?

A I don't know; I don't remember. Maybe at that time they didn't have any.

Q Do yourecall anybody coming into the hatch to check the quality or the composition of the air?

A I don't remember, no.

Q Did you knock off with everybody else at 7 o'clock?

A Yes.

Q Where did you go?

A Home.

Q Did you go to sleep that night?

A Yes.

Q Did you have dinner?

A Yes, I did.

Q When did you wake up?

A I ate very little and soon after I had gotten home after 7 o'clock I went to bed about 7:30 because I didn't feel well and I fell asleep. About 1:30, 2 o'clock in the morning, I felt very pearly and I called my wife. I told my wife I didn't feel well, I felt my chest as if I was suffocating, I couldn't breathe.

Q You say you called your wife. Was she in the house with you?

A Yes, she was at home.

Q Please continue describing what happened.

A My wife because of the fact that she doesn't speak English very well, called the owner of the house and the owners of the house called the police who called an ambulance.

Q Did the ambulance come?

A Yes.

Q Where were you taken?

A To the hospital.

Q What hospital?

A Long Island Hospital.

Q That is Long Island College Hospital?

A Yes.

Q Did your wife go with you?

A Yes.

Q When you got there what happened?

A They put me in bed, they took pictures of my body and chest.

Q Were you admitted --

THE COURT: Excuse me, I have another matter on that I must take care of immediately. I will ask you to go into the next courtroom, ladies and gentlemen, just for a few minutes.

(Jury left the courtroom.)

(Whereupon, this case recessed.)

THE COURT CLERK: Case on trial, Antonio Marrale.

THE COURT: Bring the jury in.

(Jury entered the courtroom.)

THE COURT: You may continue, Mr. Korson.

MR. KORSON: Thank you, your Honor.

BY MR. KORSON:

Q Were you admitted to the hospital?

A Yes.

Q How long did you remain in the hospital?

A One week.

Q Were any tests taken while you were there?

A Yes.

Q Were x-rays taken?

A Yes.

Q Were you given any injections?

A Yes, injections, pills, they gave me everything.

Q Did you remain in bed while you were there?

A Yes.

Q When you were discharged from the hospital, where did you go?

A Home.

Q Did you get any medical care after that?

A Yes.

Q How did you feel when you were discharged from the hospital?

A Badly.

Q What do you mean badly?

A I didn't feel well.

Q What specifically was bothering you?

A My trouble was air, I couldn't breathe too well.

Q Did you then come under the care of a doctor?

A Yes.

Q Before going to the doctor for the first time, did you receive treatment anywhere else?

A No, just this doctor that I went to see.

Q Did you ever get any treatment at L.I.A. Medical Center?

A Yes, I went there later because I felt all stuffed up and I was treated by L.I.A.

Q So first you went to the doctor. What doctor did you go to see?

A First I went to see Dr. Dunaway.

Q Where is his office?

A Third Avenue and 35th or 39th Street.

Q In Brooklyn?

A In Brooklyn.

Q What did he do for you?

A He took xrays; he gave me an injection, he gave me some pills, some medicine.

Q Did you return to him?

A I used to go to him three times a week.

Q Until when?

A I don't remember up until when.

Q Did you continue going to him into the Summer time of 1973 or did you stop before the end of June?

A I went to him -- I used to go to him two times, maybe once a week, but I used to go there.

Q My question is did you go to him beyond June?

A I don't remember.

Q Did there come a time when you had to leave the country?

A Yes.

Q Where did you go?

A Italy.

Q Had you been planning to go there or did you go in response to anything?

A I got a telegram.

Q Who was the telegram from?

A The telegram came from my mother-in-law, the mother of my wife.

Q In response to that you went to Italy?

A Yes.

Q You still had family there?

A I have two brothers there and my wife has her whole family there.

Q When you went there at that time was anybody ill?

A My wife's mother.

Q Was she at home or was she hospitalized?

A She had been in the hospital for a few days and then she was taken home.

Q How long didyou remain in Italy?

A About a month and a half, two months; I don't remember exactly.

Q How was your physical condition while you were over there?

A Bad, I didn't feel well.

Q Again, what was wrong with you?

A I went to a private doctor, a doctor in the town there, and I had him treat me for a while.

Q What were your complaints?

A Always about my chest that my chest was bothering me and I could hardly breathe.

Q Had you ever had trouble breathing before that?

A No.

Q Do you remember the name of the doctor that you went to see?

A Dr. Orlando.

Q He was in what town?

A Licata.

Q Did you goto any x-ray technicians or x-ray doctors in Italy?

A Yes.

Q Do you remember the name?

A No.

Q Did you pay the doctors in Italy?

A Yes.

MR. DELANEY: Your Honor, I object to this testimony. There has been no testimony here, as I understand it, from any of these doctors any competent medical testimony as to what they treated Mr. Marrale for. I submit that the amount of money he paid them is irrelevant.

THE COURT: Well, don't have him tell us what he paid, just have him tell us about his feelings about him.

BY MR. KORSON:

Q Did you get any injections in Italy?

A Yes, they also gave me injections.

Q About how many times did you see the doctors in Italy?

A While I was there two times a week.

Q And that is how long a period of time?

A The time that I was in Italy?

Q How long was that?

A I don't remember, maybe one month and a half, two months, I don't remember how long I was in Italy.

Q Did you obtain any reports from the doctors who treated you in Italy?

A Yes.

Q I show you this document and I ask you if this is one of those reports. I am handing you two documents, one is in Italian and one is the translation.

A Yes, this is from Dr. Luigi Tirri, took x-rays--

MR. KORSON: Your Honor, may we have this marked for identification?

THE COURT: Yes, mark it.

MR. KORSON: Incidentally, if I may just ask a question of the interpreter?

THE COURT: Yes.

MR. KORSON: Did you translate that document for me and is that your translation attached to it?

THE COURT INTERPRETER: Yes, it is.

MR. KORSON: Thank you.

Can we have that marked for identification, please?

THE COURT CLERK: Plaintiff's one for identification.

BY MR. KORSON:

Q Now, I show you three more documents, two in Italian and one in English, and I ask you if the two in Italian are the two that you obtained from the doctor?

A That is Dr. Orlando, yes.

Q And Mr. Amarante, is that your translation attached to it?

THE COURT INTERPRETER: Yes, it is.

MR. KORSON: May I have that marked for identification, plaintiff's two for identification?

THE COURT: I take it there is an objection to putting this in?

MR. DELANEY: Yes.

THE COURT: Sustained.

I don't want them in evidence.

MR. KORSON: Very well, your Honor.

BY MR. KORSON:

Q Do you remember when it was that you came back

from Italy?

A September, maybe around September.

Q When you came back, did you go back to Dr. Dunaway?

A I don't remember if I went back to him.

Q When you came back did you return to work?

A After a few days I went back to work.

Q After that did you get treatment from anybody else?

A Every once in a while when I didn't feel well, I went to the clinic.

Q Which clinic is that?

A L.I.A. Clinic.

Q Where is that located?

A Court and Union Streets.

Q During the period that you did not work from May 31st, 1973, until sometime around the middle of September, were you paid your salary?

A No.

MR. KORSON: Your Honor, at this point Mr. Delaney and I have a stipulation which I would like to inform the jury of; that the plaintiff's average weekly wage at that time was $242.00 a week.

THE COURT: $200 what?

MR. KORSON: $242.00 a week.

THE COURT: Thank you.

BY MR. KORSON:

Q After you returned to work, how did you feel?

A I didn't feel too well. Sometimes I felt worse than other times, but I had to work because I had to support my family.

Q When is the last time that you went to L.I.A. Clinic for those complaints?

A I don't remember.

Q What year?

A I went this year, but I don't know when, I complained about a cold.

Q No, I am not talking about a cold. I am talking about the complaints that you described here, the difficulty in breathing, the burning in your chest.

When was the last time that you went for those complaints?

A I don't remember.

Q Do you know what year?

A I don't remember.

Q When you go to the L.I.A. Clinic do you have to pay?

A No.

Q How is your breathing at the present time generally?

I don't mean at this very moment, I mean generally speaking?

A My chest always bothers me; I don't feel too well. The ear sometimes bothers me.

Q Do you still take any medication?

A Occasionally, yes.

Q Does it give you any relief?

A Yes, when I take these pills, yes.

Q Do you still work with HiLo's?

A Sometimes there are HiLo's and sometimes we don't have any.

Q About how often would you say that you have to work with HiLo's?

A When you have heavy cases they send machines down into the hold, and then the machines pick up these cases.

MR. KORSON: I have no further questions of this witness.

CROSS-EXAMINATION

BY MR. DELANEY:

Q Mr. Marrale, I think you said here that Mr. Bosco was your hatch boss, isn't that right?

A He was the gang boss.

Q He was your gang boss. He was your gang boss when you worked on other piers also, is that right?

A Yes, we went around with the gang and he would check the gang.

Q On this particular day, when you were working at this ship at Pier 10, from eight o'clock in the morning until noon time, how many times did you see Mr. Bosco?

A I don't remember how many times I saw him.

Q Did Mr. Bosco come down in the hatch at all?

A I don't remember.

Q Did you ever tell Mr. Bosco that day that you were breathing fumes from the HiLo and this was bothering you?

A I don't remember having seen him, how could I have told him?

Q Did you tell him, did you see him at all in the afternoon from one o'clock until seven o'clock?

A I saw him occasionally maybe off the ship or on the ship because he comes and goes from time to time.

Q At any time from one o'clock until seven o'clock did you complain to Mr. Bosco that there were too many fumes in the hatch?

A We complained in general to the men that were up on the deck, the deckmen. We did not complain to him

personally.

Q What language did you talk to Mr. Bosco in?

A Italian.

Q He understood Italian?

A Yes.

Q You said that you were feeling dizzy in the afternoon and you had to sit down. Did you tell Mr. Bosco about that?

A As soon as I saw him on the occasion that I did see him, I told him that I didn't feel well, that I was dizzy.

Q I am asking you about May 21st, aboard the ship, did you tell Mr. Bosco on that day aboard the ship?

A I don't remember if it was that day.

Q When you finished working that night at 7 o'clock did your gang close up the hatch?

A No, by law the sailors have to close up the hatch.

Q Was Mr. Bosco there when you left the gang?

A I don't remember if he was there or not.

Q When you left the hatch, did you go down to the pier?

A Yes.

Q On your way off the pier, did you stop at the timekeeper's office to tell him that something happened

to you while you were working on the ship?

A No.

Q When was the first time after May 31st, when you went down to the pier and told somebody that something had happened to you while working on the ship on May 31st?

A Wait a minute, before I answer that, I have to tell you that very same night I went to the hospital.

Q After you got out of the hospital, how long was it before you went down to the pier and told somebody that something had happened to you?

A About ten or twelve days went by.

Q Who did you tell when you went down to the pier?

A I told it to the timekeeper, but the timekeeper didn't want to ack nowledge it.

Q Who else did you tell besides the timekeeper?

A There was somebody else there who said ten days have gone by, twelve days have gone by, and we know nothing about this thing and then I talked to my lawyer and my lawyer sent me to Pittston's office.

Q You went to Pittston's office. Who did you talk to there?

A I don't know, a clerk or somebody.

Q Did somebody take down a statement from you as to what happened?

A Yes.

Q Was there a girl there who interpreted English into Italian?

A Yes.

Q Well, you said that you went to see Pittston after you had gone to see your law yer, is that right?

A Yes.

MR. KORSON: Your Honor, I object to the form of that question. The testimony was that he first went to Pittston and they refused to acknowledge it.

THE COURT: Overruled.

BY MR. DELANEY:

Q At the time that you went down to Pittston and gave this statement to this girl, you had gone to see Dr. Dunaway at that time?

A I don't remember whether I had gone to see him or not.

Q Do you remember if they asked you whether you had seen a doctor?

A I don't remember.

Q Did your lawyer send you to see Dr. Dunaway?

A Yes.

Q Do you recall the first date that you saw Dr. Dunaway?

Was that about June 13th or 14th?

A I don't remember.

Q Do you remember what day you left for Italy?

A I think it was June 29th.

Q Mr. Marrale, did you have a passport when you went to Italy?

A Yes.

Q Do you still have that passport?

A Yes, but then it was still an Italian passport, I have it, I still have it.

Q You still have the passport?

A Yes.

Q Will you bring it here to Court tomorrow?

A Yes, if I can find it.

Maybe my wife has it.

Q Now, when you got back from Italy, did you go to see any doctor in New York, Dr. Dunaway or a doctor at the clinic?

A I told you before that I went to the clinic twice a week.

Q Was that before you went back to work?

A It was before and after as well.

Q Did anybody at the clinic say that it was all right for you to go back to work?

A When I was going to the clinic I had already started to work.

Q In between the time that you came back from Italy and you went back to work, is it correct that you did not see a doctor?

A I don't remember.

Q Let's go back to this ship you were working on that day. Do you remember what kind of hatch covers they had?

A I don't remember.

Q Were they McGregors?

A What is McGregor?

Q The kind that fold up.

A Maybe that is what they were, but I really don't remember.

Q You said the hatch was half opened. Was it half opened from the aft part to the forward part or half open from side to side?

A I don't remember. She was forward, but I don't remember.

Q I think you said in your testimony that when you first started working, you were down the second level down from the top, is that right?

A Yes.

Q You said that the stevedor put down some blowers

into the hatch?

A Yes.

Q Whereabouts were the blowers themselves up on the deck?

A Onthe hatch.

Q What ran down into the hatch?

A They send the air down.

Q Like a hose or something?

A Yes, something like that. About so large. (Indicating).

Q Indicating about what, twelve inches?

A Twelve, twenty,who knows.

Q Do you remember when those fans were first put down into the hold?

A Generally, they put them down in the morning.

Q Do you remember what they did that particular day?

A Who knows?

We are down in the hatch, the men are on the deck. Who knows what they are doing.

Q What time do they first put the HiLo in the hatch?

A About 8:15, as soon as we started to work we needed the machine and they put the machine down.

Q At 8:30 did you see some Pittston man coming down and testing the air?

A No.

Q Have you ever seen anybody test the air in a hatch?

A No.

Q Now, you said here that the blowers that Pittston put down in the hatch were broken?

A They send some man down, but they didn't appear to be very good.

Q Did you complain about this to Mr. Bosco?

A Everybody in the hatch complained to the men who were up on the deck telling them that the air was not too good, they all complained.

Q Mr. Morrale, did you complain to Mr. Bosco?

A I don't remember whether I complained to Mr. Bosco.

Q Now, you say that you complained to the men up on the deck Did you complain tothe signal man?

A Yes, the man who makes and gives the signals and there were sailors there too.

Q The signal man works in your gang, is that right?

A Yes.

Q What is his name?

A John Sosino.

Q Did John Sosino do anything about your complaints?

A Who knows? We are down in the hatch; they are up on the deck. They were talking, but who knows what they were saying.

Q How long does it take to lift a HiLo and put it down into the hatch?

A From the dock down to the hold?

Q Yes.

A Five, six, seven, ten minutes.

Q Do youhave to take it apart when you put it in?

A It goes in two parts.

Q They put it back together in the hatch, is that right?

A Yes.

Q You claim that the stevedores changed the HiLo's at least twice during the day, is that right?

A Maybe three.

Q Now, besides speaking Italian do you speak any other language?

A A word or so of English.

Q Do you speak Portuguese?

A No.

Q Do you speak Spanish?

A We work with them, one word with another, you know.

Q What language were you talking to the crew in?

A What crew?

Q You told us that there were members of the crew around the hatch and you were complaining to members of the crew there. What language did you speak to the crew in?

MR. KORSON: Your Honor, I object to the form. The testimony was they complained to the men on the deck.

THE COURT: I will permit it.

THE WITNESS: I didn't talk to the officers nor did I talk to the sailors.

BY MR. DELANEY:

Q When you were making complaints from down in the hatch to the signal man, what language were you making the complaint in?

A My language, Italian.

Q When your gang goes to work in a hatch, how many men go down in the hatch?

A Normally eight.

Q If you have a HiLo working with you in the hatch,

what is the function of eight men in the hatch?

What do they do?

A Whatever is necessary to do for the gang to unhook the wires, to fix a case or so, you know,

Q So if a case comes into the hatch, or if you unhook it ---

A Yes.

Q Was it necessary to have all eight men down in the hatch while the Hil o was there?

A Of course you need all eight men down there.

Q Did any of them take a coffee break?

A I don't remember, but we do have somebody who goes and gets us coffee.

Q Did you go out and get the coffee that day?

A I don't remember if I did or not.

Q Did you go out from the hatch from eight o'clock until noon?

A At noon time I went to eat.

Q Where did you eat?

A At hom e.

Q What did you have to eat.

MR. KORSON: Objection.

A Who can remember?

THE COURT: I will permit it.

THE WITNESS: Who can remember?

BY MR. DELANEY:

Q When you came back at one o'clock, did you go back to the upper twin deck, the second level of the deck?

A Yes.

We finished thoreand then we went down to the hold.

Q Was it necessary to open the hold to go down into the hole?

A Yes. How else can you get down there?

Q When youwere working the second level down, you said there were ventilation equipment there. Will you describe it? Where in the hatch was it and what did it look like?

A What ventilation?

Q I think you said that the ship had ventilation equipment. Do you know if it had ventilation equipment or not?

A Almost all vessels have ventilation; but the ventilation is for all of the hatches.

Q Now, whereabouts in this hatch was the ventilation system?

A Who can remember.

Q So how do you know if it wasn't working if you don't know where it was?

MR. KORSON: Objection, argumentative.

THE COURT: I will permit it.

A You have pipes in the air or through the hold hatch, all the hatches. They are like pipes that run across.

Q Does the air come out of them?

A When we are working the air comes out.

Q Was the air coming out on them on that date?

A No air was coming from those pipes.

Q Was the air going into those pipes?

A If she was not working, how could the air go in?

Q Was the air going in?

A How could the air go in if something is dead, no air can go in.

Q Whereabouts were these pipes located?

A In the ceiling.

Q How high from the floor is that?

A I don't know, I didn't take a ruler and measure it.

Q Was it twelve feet, 15 feet?

A It depends upon the height of the hatch level.

Q Give us an approximation.

A Ten feet, twelve feet, fifteen feet.

Q Could you reach the ceiling?

A Sometimes when we put cargo down we touch it.

Q Could you reach the ceiling that day?

A Who can remember.

Q Now, Mr. Marrale, before this incident on May 31st, 1973, did you ever smoke?

A Yes, I used to smoke.

Q Did you smoke afterwards?

A When after?

Q Did you smoke any time after June 1973?

A Occasionally I would smoke. Then I saw it didn't make me feel too well, so I stopped.

Q Now, on the night that you got sick, did you go to the L.I.A. Clinic?

A If I went to the hospital how could I have gone to the clinic?

Q Did you call the clinic?

A At night how can I call the clinic? I went to the hospital.

Q I am asking you, did you?

A No, I was taken to the hospital, I could hardly talk.

Q When you woke up during the night, did you have pain in your chest?

A Not pain. The only thing I was lacking was air, I couldn't breathe.

Q At any time before May 31st, 1973, did you ever have pain in your chest or have problems breathing?

A No, never.

Q Did you remember going to the L.I.A. clinic in June of 1972 complaining of pain in your chest and having trouble breathing?

A No, I didn't.

Q Did you go in July of 1972 to the clinic?

A I go to the clinic, but who can remember the date.

Q Do you remember going and complaining of pain in the chest and they stuck wires on you and gave you a test?

A I don't remember.

Q I think you said there was smoke in the hold while you were working there. Where did this smoke come from?

A From the machine.

Q You said during the day somebody came down in the hatch. Do you know who it was who came down in the hatch?

A I saw sailors coming down.

I don't know what they were doing. They looked around and then they would leave.

Q How did you know they were sailors?

A You can see that they were sailors as distinguished from the longshoremen.

Q Whilethey were down in the hatch, did anyone talk to them to make any complaints?

A I don't remember if they did or not.

Q Did you make any complaint?

A I complained to the men up on the deck.

Q Was there a driver on this HiLo while it was down in the hatch all day long?

A Yes.

Q Is it the same driver?

A They change because they get relieved every half hour or so.

Q Do you know the name of any of those HiLo drivers?

A Who can remember.

Q I think during your testimony you said that when you are working in hatches sometimes they have to change hatches when you are using a HiLo. Who is they?

A The bosses who tell you to change hatches.

Q The boss of the stevedore?

A Yes.

Q Is he the boss of your gang?

A He is the big boss who gives my boss orders and also gives the seamen orders, tells them where the cargo is to be placed down in the hatch. For example, he will s ay put this cargo over here or over there.

Q Did the seamen come down in the hatch and move

the cargo around?

A They don't move it around. All they do is look at it.

Q And the longshoremen move it around?

A Yes.

Q Now, you said that you felt badly when discharged from the hospital. Describe how you felt.

A I was weak; I had shortness of breath. I couldn't breathe.

Q Now, while you were in the hospital what did they do for you?

A They took x-rays of my chest, my shoulders, all over, my stomach.

They gave me injections, pills. They put some wires on my chest and around my arms.

Q Did they take a blood test from you?

A Maybe, yes.

Q Mr. Marrale, since you went back to work in September of 1973, have you worked more hours on the average than you did before your accident or less?

A It depends how we get jobs.

If there is work we work.

Q But in total have you been working more hours or less.

A Who figures that out?

Q So the answer is you don't know?

A I don't know.

MR. DELANEY: No further questions of this witness.

THE COURT: Any redirect?

MR. KORSON: Just a few.

THE COURT: Please make it brief.

MR. KORSON: I shall, your Honor.

REDIRECT EXAMINATION

BY MR. KORSON:

Q Mr. Marrale, did anybody send you to the doctor in Italy?

A I went by myself because I didn't feel well.

Q The mates on the ship when the ship is in Port in New York, do they have to speak from time to time with the stevedore?

MR. DELANEY: Your Honor, I object to this. This being out of his realm. He said that he was working in the hatch. There is no testimony that the stevedore came down into the hatch.

MR. KORSON: I am talking about practice, and not about that particular day. I am getting at it from a different point.

THE COURT: You better rephrase it.

BY MR. KORSON:

Q When a ship is in port in New York is it necessary for the mate to speak with the stevedore in the English language?

A Excuse me, these are questions which I cannot answer because I don't know whether they talk to the stevedores or not.

Q When you hear the mates speak, what language do you hear them speak in?

A Who do you mean by mates? The ones who secure the vessel?

Q The officers of the ships.

A The officers speak English, Italian, it depends.

Q The other men in your gang, what language do they speak?

A Italian, Spanish, and English.

Q What about Mr.Sosino, what language does he speak?

A He speaks Italian and English.

MR. KORSON: Thank you.

THE COURT: You may step down.

Call your next witness.

A N G E L O P E R I T R E, was called as a witness by the Clerk of the Court, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KORSON:

Q What is your address?

A 2525 East 13th Street, Brooklyn, New York.

Q What is your occupation?

A Longshoreman.

Q How long have you worked as a longshoreman?

A 1960 I started.

Q Are you a hold man?

A Yes.

Q Are you a member of Michael Bosco's gang?

A Yes.

Q How long have you been with that company?

A Ten years.

Q On May 31st, were you working with your gang?

A Yes.

Q Did you work by yourself that day or did the longshoremen work with partners?

A Everybody got a partner.

Q Who was your partner on that day?

A Antonio Marrale.

Q On that date do you recall what pier you were working at?

A Excuse me?

Q Do you recall working with Mr. Marrale on that day when there was some difficulty with HiLo's?

A Yes.

Q What pier did that take place on?

A Pier 10.

Q Do you know what the name of the ship was?

A I don't know.

Q Do you know the nationality?

A I think Brazil.

Q Did you work on that ship all day?

A Yes.

Q Did you work in the same hatch all day?

A Yes.

Q Do you remember if you worked there the day before?

A No, sir.

Q No, you didn't or no you don't remember?

A We didn't work on that pier the day before.

Q What time did you start?

A Eight o'clock in the morning.

Q Do you remember which hatch you were working out of on that day?

A I know that it was number three or number two.

Q It was one of the forward hatches?

A In the front of the ship, yes.

Q Whatever hatch it was, when you got there that morning, do you remember if it was open or closed?

A Half of it was open.

Q Do you remember which hatch was opened?

A I think the forward.

Q Why was it half closed?

A I think it was knocked down, it was a big case, it cannot be opened the other hatch.

Q That is cargo?

A Yes.

Q That was at the top of the hatch?

A Yes, I don't remember if it was in between deck or top deck.

Q You are saying there was a knock down or a big case on the hatch cover but you don't know if it was on the top deck or the between deck?

A Yes.

Q Whatever deck it was, was it on the hatch cover?

A It was a steel cover.

Q No, whatever deck the case was on, was the case on the hatch covered?

A Yes.

Q Do you remember which deck you went down at eight o'clock?

A Eight o'clock I think we go to the second deck.

Q That is between deck?

A The first deck.

Q Were they loading or discharging?

A Loading.

Q What kind of cargo?

A We got some general, we have some cases.

Q What do you mean by general cargos, is that mixed?

A General cargo usually is on pallets, cases come on wire. Over two or three tons is a case.

Q We are getting into a new terminology. When you say a pallet, you are talking about a type of wooden frame?

A Yes.

Q Cargo goes on top of that?

A Right.

Q So the cargo was coming either on pallets or on wires?

A Right.

Q Was anything else being used to load the cargo on that morning?

A A machine.

Q What kind of a machine?

A Gas machine.

Q A HiLo?

A Yes.

Q Was there any ventilation system in the hatch to get rid of the fumes?

A There was a blower.

Q Who installed the blower?

A I don't know.

Q I don't mean who was the individual who installed it, but was it the ship or the stevedoring company that installed it?

A The stevedore.

Q When they install it, what do they connect it to?

A A plug on the edge of the deck.

Q That is on the ship?

A Yes, and they plug it in.

Q They use the ship's electrical system?

A Yes.

Q This runs down into the hatch?

A Yes.

Q Is there one or more than one?

A I think it's two, one at each corner.

Q How many HiLos were used at that time in the hatch?

A One HiLo at a time.

Q Did one of the HiLo men drive it or did they have a --

A I don't remember.

Q Did you work the entire morning on the same deck?

A Yes.

Q Any problems?

A Yes, there was a lot of smoke.

Q Had you worked with HiLo's like that before?

A Yes.

Q Did you have this kind of smoke before?

A No.

Q Was there anything different about the time you had worked with HiLo's before?

A We change the machine.

Q When you say you change the machine, do you mean then if there was a HiLo smoking a lot you would put another machine in?

A Yes.

Q Is that what you had done on other ships or other

jobs on that pier?

A It happened.

Q At that time,1973, did the piers have electric machines as well as gas?

A Yes.

Q Were any electric machines used on that ship that day?

A No.

Q Was the HiLo used all day?

A Different HiLo, but gas.

Q All gas?

A Yes.

Q How many different HiLo's were used?

A Two or three we changed.

Q Why were they changed?

A The other machine was bad, they figured less smoke.

Q Who ordered the new HiLo to be put or brought into the hatch?

A I don't know, they complained about the machine so they brought in another one.

Q Who complained?

A The men down in the hole.

Q Were you one of the men who complained?

A Yes.

Q Who did you complain to?

A To the gangway men.

Q Was anybody else up on the deck when the complaints were made?

A Yes, people passing by, mates, they talk.

Q Were there any mates there when complaints were made?

A Yes.

Q Did any mates come into the house?

A I don't think so.

Q Did the mates say anything that day if you heard?

MR. DELANEY: To whom?

A They do like this (Indicating).

Q You are making a gesture, you are spreading your hands apart. What do you mean by that?

A I don't know what we are going to do, what can we say?

Q Do you know if the mates on the ship spoke English?

A Like this, half and half.

Q Did you hear any mates speaking English that day?

A No.

Q Did any seamen come into the hatch?

A No.

Q When the mates came into the hatch was it in the morning or in the afternoon?

A In the morning.

Q Was it one mate or more than one?

A One.

Q Did he come in one time that day or more than one time that day?

A I think, you know, he come down a few times.

Q What did he do when he was down there, if you know?

A Look around the cargo, look at the situation.

Q While he was down there, was a HiL o being operated?

A Yes.

Q Were fumes coming out?

A Yes.

Q Was anybody coughing?

A Yes.

Q Did anyone make any complaints when he was there?

A Everybody saidthere was a lot of smoke and we cannot stay like this.

Q At any time that day was the entire hatch opened above you?

A Half.

Q At any time did they open the whole hatch?

A Never.

Q Did that hatch have a ventilation system other than the blower?

A Sure, they have ventilators.

Q Do you know if it was operating that day?

A No.

Q No, it wasn't, or no you don't know.

A They don't work otherwise they pull them out.

Q Well --

MR. DELANEY: Excuse me, I didn't understand that last part?

MR. KORSON: He said that they don't work otherwise they pull them out.

MR. DELANEY: Pull what out?

THE WITNESS: The air.

BY MR. KORSON:

Q Do you know for a fact that they weren't working or are you saying that because the air wasn't clear?

A There was no noise.

The ventilator machine makes a lot of noise.

Q So when the ventilator operates you can hear it?

A Yes.

Q Did you hear it on that day?

A No.

Q Did Mr. Marrale make any complaints that day?

A Yes.

Q Did you go off the ship for lunch from 12 to 1?

A Yes.

Q When you came back, did you work in the same deck level all day?

A We switch all day, about two or three times we go to lower holes, we switch a lot of times, we go to different decks.

Q Was it all within the same hatch?

A Yes.

Q Was there any relief from the fumes?

A They figure there was relief when they changed the machines --

Q I am not talking relief for the driver of the HiLo. Did the condition of the fumes get any better during the day?

A No.

Q When you complained to the gang way man, did he

say anything?

A They got to talk to somebody.

Q Did they ever stop the men from working that day?

A No.

Q If a mate came to a hatch and he found something to be wrong, in your experience as a longshoreman, does the mate have the authority to stop the work if there is something dangerous?

MR. DELANEY: I object.

It has not been established that this man or his gang took orders from a mate.

THE COURT: Yes, I think that is so.

I do not believe that he ever took orders from a mate directly; he took it from his own hatch boss.

BY MR. KORSON:

Q In your experience as a longshoreman, have you seen the mates give any directions to the stevedore or to the hatch boss?

A A lot of times.

Q If a mate is present when a dangerous condition is observed and a mate is informedof it, does he have the authority to tell the stevedore or the hatch boss to stop the longshoreman from working?

MR. DELANEY: I object. This man is not in a position to know.

THE COURT: Rephrase the question.

BY MR. KORSON:

Q Have you seen a mate stop the longshoremen from working when a dangerous condition was observed?

A A lot of times.

MR. KORSON: I have no further questions.

CROSS-EXAMINATION

BY MR. DELANEY:

Q Do you know Mr. Bosco?

A Yes.

Q Do you know him well?

A I work with him.

Q You worked with him for ten years?

A Yes.

Q At any time during the morning of May 31st, did you see Mr. Bosco on deck?

A Coming and going.

Q Did you ever see him down in the hatch?

A No.

Q Did you ever talk to Mr. Bosco that morning or make any complaints directly to Mr. Bosco?

A We made a complaint to the gangway man.

Q But did you make it to Mr. Bosco?

A The gangwayman is supposed to tell it to Mr. Bosco.

Q But you said you complained to the gangway man and he didn't do anything?

A Yes.

Q Now after you complained to the gangway man and after he didn't do anything,did you see Mr. Bosco after that?

MR. KORSON: I object to the form.

He testified that he complained to the gangway man and the mate came down.

THE COURT: I will permit the question.

Do you understand the question?

THE WITNESS: Yes, I don't know.

THE COURT: Repeat the question.

BY MR. DELANEY:

Q After you made a complaint to the gangway man, did you see Mr. Bosco after that time?

A Twelve o'clock.

Q Did you make any complaint to him then?

A Yes, we said that there is a lot of smoke in the holes.

Q When you went back to work at one o'clock, from one o'clock until seven o'clock, did you make any complaints

to Mr. Bosco during that period of time?

A They changed the machine.

Q When they changed the machine was Mr. Bosco there

A Mr. Bosco, you see, where I work I see the faces on the deck. The hatch boss coming and going, they go look for cargo. They didn't stay there all of the time.

The gangway is eight hour day, but Mr. Bosco comes and goes.

Q Whilehe was there looking down the hatch, did you complain to him during that time?

A At 12 o'clock I complained.

Q How about from one o'clock until seven o'clock?

A We complained to the gangway man.

Q Did you complain to Mr. Bosco also during that period of time?

A Twelve o'clock when they changed the machine.

Q I am not asking you about 12 o'clock. I am asking you fromone o'clock until 7 o'clock during the afternoon, did you complain to Mr. Bosco?

A No, to the gangway.

Q Now, do you know a man by the name of Louis Clemente?

A I never heard of him.

Q He is an investigator that goes around and talks

to you about accidents.

A I never heard of him.

Q Do you remember talking to him and telling him what happened?

A I don't remember.

Q We are talking about these different machines and HiLo's, who owned them?

A The stevedores.

Q Pittston?

A Yes.

Q Can you describe this ventilation system on the ship, the one thatyou are talking about?

A The ventilation is supposed to exhaust the fumes, they bring fresh air to the cargo.

Q Whereabouts are they in the hatch?

A Excuse me?

Q Where about are these ventilators in the hatch and what do they look like?

A They have ventilators in the corner and then they have big tubes on one side and on the other side.

Q They open up so much a foot, square foot every so many feet they have to open it up so that the air can go in.

Q From where you are standing during the day, can

you reach that ventilator?

A Yes.

Q You could reach it?

A Yes, we opened it up because the ventilator we figured they were closed, but nothing worked.

Q Did you ever tell the gangway man that you wanted the ventilators turned on?

A We tell him there was a lot of fumes.

Q Did you tell him that you wanted the ventilators turned on?

A We say a lot of fumes.

Q You said that therewas a mate that came down into the hatch to look at the cargo?

A Yes.

Q Did you talk to the mate?

A No.

Q Do you know if anybody else in your gang talked to the mate?

A Yes, everybody say about the smoke.

Q Do you know if anybody asked him to turn on the ventilators?

A I don't know.

Q Do you remember what the weather was like on that day?

A I cannot say.

MR. DELANEY: No further questions.

REDIRECT EXAMINATION

BY MR. KORSON:

Q Mr. Peritre, you said that there were cases near the ventilators that were moved. Are you talking about cargo?

A No, the ventilators they have, well, like you open like this, they have a small gate.

Q Like a plate?

A Right, sometimes they are closed so we open it up and nothing came out.

MR. KORSON:T hank you.

THE COURT: You may step down.

MR. KORSON: That's the plaintiff's case.

THE COURT: Does the defendant have witnesses?

MR. DELANEY: Your Honor, I have my experts lined up for tomorrow. They are not ready for today.

THE COURT: On liability or medical?

MR. DELANEY: On both.

THE COURT:Can't you get your experts on the liability portion here this afternoon?

Who are you going to have?

MR. DELANEY: The Safety Director of the United States Terminal.

THE COURT: Try to get him here by two o'clock.

MR. DELANEY: I don't know where he is.

THE COURT: Well, try to find him.

I will try the liability today.

We will see if there will be any need to have a doctor here on Thursday. Try to have him here at two o'clock please.

Where does he work? What is his place of business?

MR. DELANEY: Bayonne.

THE COURT: All right, call him. If not, go over and take a cab to Bayonne and look for him or have somebody look for him and be back here at two o'clock.

Ladies and gentlemen, please don't discuss the case. Now, the clerk will show you where to keep your things and come back and how to get in.

(Jury left the courtroom.)

(Whereupon, Court then recessed until 2 P.M.)

THE COURT: Bring the jury in.

(Jury entered the courtroom.)

M I C H A E L B O S C O, having been called as a witness, was sworn by the Clerk of the Court, and testified as follows:

DIRECT EXAMINATION

BY MR. DELANEY:

Q Mr. Bosco,what is your occupation?

A Longshoreman.

Q What is your job in the longshore gang?

A Hatch boss.

Q How long have you been a hatch boss?

A Fourteen years.

Q For a period of the last five years has Mr. Antonio Marrale been a member of your gang?

A Yes.

Q What job does he have in your gang?

A Hold man.

Q Do you remember an incident when your gang was working on a ship at Pier 10 from Pittston Stevedoring in 1973?

A Yes.

Q Do you remember something happening to Mr. Marrale?

A No, not that day.

Q Sometime after that day did you find out that Mr. Marrale got sick or injured that day?

A One of the members of my gang told me that.

Q When did he tell you that?

A The day after.

Q Now, the day that we are talking about which

1 happened to be May 31st, 1973, do you remember what hatch
2 your gang was working in that day?
3 A I don't remember.
4 Q Do you remember if the hatch was opened
5 completely at the top or whether it was only half opened?
6 A I don't remember.
7 Q Do you remember using a HiLo in the hatch
8 that day?
9 A Yes.
10 Q Whose HiLo was that?
11 A Pittston.
12 Q You worked for Pittston too, is that right?
13 A On that day, yes.
14 Q Sometime after you started working that day,
15 using the HiLo, did somebody complain to you that the HiLo was
16 smoking too much?
17 A Yes, sir.
18 Q What did you do?
19 A I changed it.
20 Q You got another HiLo?
21 A Yes.
22 Q Did the complaints continue after the second
23 HiLo got down to the hatch?
24 A I don't remember.
25

Q Do you remember how long your gang worked that day?

A I don't remember.

Q Do you recall any time during that afternoon whether anybody in your gang complained to you that there was too much smoke down in the hatch and they were getting dizzy or coughing from it?

A I don't remember.

Q You don't remember if they complained or they didn't complain?

MR. KORSON: The answer was very clear. I object to Mr. Delaney attempting to rephrase the answer.

THE COURT: Overruled, you may answer.

A I don't remember.

Q During the afternoon did Mr. Marrale complain to you about the conditions down in the hatch, there was too much smoke down there?

A I don't remember.

Q Mr. Bosco, do you remember that day whether the stevedore used any blowers down in that hatch?

A Yes.

Q Do you remember how many blowers?

A I don't remember.

Q Can you describe a blower to us?

A It is sort of like a piece of steel like this.

Q An electric motor?

A Yes.

Q How does the air get down into the hatch from up on top?

A I don't understand your question?

Q How does the air, how does the blower make the air go down to the hatch?

A On this piece of steel like this, we got sleeves from the top all the way down to the hatch.

Q Is the sleeve like a hose?

A Yes.

Q And the air goes down through that hose?

A Yes.

Q As far as you remember that day were those blowers working?

A I don't remember.

Q Do you remember if anybody complained to you about the blowers?

A I don't remember.

Q After the HiLo is put in the hatch are tests made of the air down in the hatch?

A I don't understand you?

Q After you put the HiLo down in the hatch it start to work, is it necesary to make a test of the air down there?

A You are supposed to.

Q Do you remember that date if Pittston had tests made?

A I don't remember.

Q If anyone told you they were coughing and feeling faint, feeling dizzy down in the hatch when they had the HiLo, what would you do?

A I would go to the foreman and I would tell him to stop the work.

Q You were going to stop the work, is that right?

A Yes.

Q Do you remember that date, Mr. Bosco, whether the ship ventilators were working?

A I don't remember.

Q Do you remember if anybody complained to you about it?

A I don't remember.

Q If the ship ventilators were working and your men were down in that hatch, what would you do?

A Say it again?

Q All right. If there was a HiLo working in the lower hold and your men were working there and the ship

ventilators were not working, what would you do?

A The ship's ventilation doesn't work?

Q Yes.

A What would I do?

Q Yes, what would you do?

A I go and tell the foreman to tell him the ship's ventilation system is not good.

Q If it got bad would you have to stop the work?

A I would stop if he told me to stop.

Q On that particular day, did you stop the work?

A I don't remember.

Q If you stopped working, would that be a detentic

A That is not my --

Q That is not your department?

A No.

Q When your gang left the ship at the end of the da did you know that anything had happened to Mr. Marrale?

A I don't remember.

Q You don't remember or he didn't tell you?

A I don't remember.

Q The first thing you remember is somebody told you the next day?

A That's right.

MR. DELANEY: I have no further questions.

CROSS-EXAMINATION

BY MR. KORSON:

Q Do you recall if the mates on the ship were talking about smoke in English?

A Yes.

Q And do they?

A Yes.

Q From time to time is it the practice of the mate to come to the hatch to see how the work is progressing?

A Yes.

Q Do they also go into the hatch from time to time?

A Yes.

Q If the mate sees something wrong, something dangerous like too much fumes in the hatch, can he stop the work?

A Yes.

Q Do you have any authority to stop the work yourself?

A No.

Q Who has this authority besides the mate?

A The foreman, the stevedore.

Q That is the one who you would tell if something were told to you?

A Now, why would you change the HiLo in a hatch, is that something that you normally do or do you do it for a particular reason?

A Because there was too much smoke.

Q You change it when there is too much smoke?

A Yes.

Q And you don't remember if it was changed one time or more than one time?

A I don't remember.

Q When work stops and there is a detention as Mr.Delaney referred to, I will use say when work stops, who is that has to pay the Stevedore Company for their time?

A The steamship company.

Q So if work then stops, it costs the steamship money?

A Yes.

Q You gave testimony yesterday in Mr. Delaney's office about the same subject?

A Yes.

Q And your testimony was the same?

A Yes.

Q It was all written down?

A Yes.

MR. KORSON: Thank you.

THE COURT: It has not been transcribed yet?

MR. KORSON: Yes.

THE COURT: That is why we don't have it here today, ladies and gentlemen, because it has not been transcribed.

REDIRECT EXAMINATION

BY MR. DELANEY:

Q How would the mate know if there were too many fumes down in the hatch?

A I don't know.

Q How would you know if there were too many fumes in the hatch?

A Because I feel it myself.

Q Can you smell it, is that what you mean?

A Yes.

Q During the day you normally go down to the hatch when the gang is working?

A Sometimes yes and sometimes no.

Q When there is a HiLo down there and there are complaints about the HiLo, would you go down into the hatch yourself?

A No.

Q Not necessarily?

A No.

MR. DELANEY: Thank you, that is all.

THE COURT: Thank you, you may step down.

Do you have any other witnesses?

MR. DELANEY: No, your Honor, I couldn't find either one of them.

THE COURT: Will you have them here at 10 o'clock tomorrow morning?

MR. DELANEY: Yes.

THE COURT: We cannot proceed further on this issue.

MR. DELANEY: No.

THE COURT: Will you have any other witnesses on liability?

MR. KORSON: No.

THE COURT: All right, ladies and gentlemen, we will now close for the day until ten o'clock tomorrow morning. Pleasedon't discuss the case. Remember what I said about not reading the newspaper and watching television.

Enjoy your evening and be back here in the jury room at ten o'clock tomorrow morning.

(Jury left the courtroom.)

THE COURT: Gentlemen, I prepared the charge and the clerk will xerox it.

I will give you copies as soon as they are ready and we will go over it.

This is the charge on liability alone.

MR. DELANEY: Your Honor, I have a memorandum, a Fifth Circuit Case.

THE COURT: Mark it.

THE COURT CLERK: Marked Court exhibit one.

THE COURT: Have you marked the proposed charge?

THE COURT CLERK: Court exhibit two.

THE COURT: Mark the defendant's request to charge.

THE COURT CLERK: Court exhibit 3.

THE COURT: Defendan't srequest to charge was received after the Court's proposed charge had been prepared. Does the plaintiff have any objection to the charge?

MR. KORSON: None.

THE COURT: I will hear from the defendant if he has any objection.

MR. DELANEY: Thank you, your Honor.

On page 3 the beginning of the first full paragraph discontinuing duty to use ordinary care, I would object to the use of the continuing duty.

THE COURT: You want the word continuing out?

MR. DELANEY: Yes.

THE COURT: All right, I will take it out.

MR. KORSON: I would then take exception to that your Honor, because it seems to imply to the jury that once the longshoreman is working the place doesn't have to be maintained safe by the vessel; that doesn't accurately state the law.

THE COURT: No, I think it's clear.

What else does this defendant want?

MR. DELANEY: Your Honor, the defendant has no other objection to the charge as submitted. The defendant would just request a couple of additional further charges.

One is as to the -- well, of course, the evidence isn't in yet, so your Honor might disagree, but there is no duty on the part of the ship on it--

THE COURT: Number?

MR. DELANEY: 7, your Honor.

THE COURT: Defendant's request 7?

MR. DELANEY: Yes, your Honor.

THE COURT: Well, that is the case, isn't it?

MR. DELANEY: Yes, it is.

That is what the safety regulation says.

MR. KORSON: As far as I know that is right.

THE COURT: All right, then I will add it.

MR. KORSON: Your Honor, let me put it this way: There is no statutory duty, but I think there is a factual question for the jury as to whether the ship owner once it gets the complaint would check the area. So I don't think it's correct to say that with these circumstances alleged.

THE COURT: Well, I think it's all right as it is.

What else?

MR. DELANEY: Number 19 and number 20.

MR. KORSON: 19 is very misleading, your Honor. The jury is liable to say why isn't the stevedore in this case? I don't think it accurately states the law. The primary duty assumes that the stevedore has a greater duty to provide a safe place to work than the ship owner and I don't know of any cases that say that and I don't think that is an accurate statement of the law.

THE COURT: Why don't we say the primary duty is to furnish a reasonably safe place to work with respect to danger created by the operation of a Hi-Lo machine is that of the stevedoring contract to provide the plaintiff--

MR. DELANEY: I agree to that, your Honor.

MR. KORSON: Again, I don't know if there is such a thing as a primary duty. The stevedore may have the duty of doing mechanically what is necessary. But there is an allegation here that the ship's ventilation system was not working properly. So I think we have more than that here and we are focusing on something that I don't think should get such a focus. Perhaps a charge along the line that the stevedore has the obligation to correct the condition while the vessel must still provide the plaintiff with a reasonably safe place to work. If we keep them together we can see that the duties are different, but it does not obviate one or the other.

THE COURT: I amend 19 to read as follows:

The primary duty to furnish a reasonably safe place to work with respect to dangers created by the operation of a HiLo machine is that of expert stevedoring contractor who employed the plaintiff. If you find that the ship's ventilation system was not working properly because of the negligence of the defendant then, of course, you can find the defendant liable. As I understand the testimony, the portable ventilators were put in by Pittston.

MR. KORSON: The blowers.

THE COURT: Yes.

So the only liability here, I think would be from the ship's ventilation system. Otherwise there is nothing in this case.

MR. KORSON: No, your Honor. The duty is more than that. If the ship is aware that the ventilation in the hatch is not proper regardless of whose equipment it is, then they should stop the work unless it is corrected and not have their men subjected to that danger.

THE COURT: We can add if the defendant knew of the dangers if any in the hold that it was negligent in not taking corrective action, they can find the defendant liable.

MR. KORSON: Fine.

THE COURT: What else does the defendant want? Do you want 20?

MR. KORSON: That is the same as what we are talking about, your Honor.

THE COURT: The difficulty with 20 is that longshoremen might not know the dangers involved.

MR. DELANEY: The same problem can apply to the ship owners. They are the experts, they are working in confined areas with HiLos, and they are

the ones who should have had the experience of being overcome by fumes; that is what the regulations are.

MR. KORSON: Another factor we have here in analyzing whether or not the vessel is liable, your Honor, is that although the vessel cannot tell the longshoremen how to do their work, they can't tell them to stop doing something that is dangerous or avoid doing something that is dangerous. The vessel knows that half the hatch was closed simply because there is a heavy case on it and if opening it up gives greater ventilation, they should have opened it up.

THE COURT: But the stevedore put those cases on.

MR. KORSON: That case was there when they got there. This was not loaded by these men.

MR. DELANEY: They have been in New York for five days.

MR. KORSON: I say theywere not there the day before.

MR. DELANEY: But somebody else was.

THE COURT: I would change it to read if they find that the condition which caused plaintiff alleged injury should reasonably have been corrected by the stevedore alone, then you must find for the ship owner.

I will add defendant's A and then I will add defendant's 19 and 20 as modified. So on page three then, after the first full paragraph you will add the following: There was no duty on the part of the ship owner to test the hold fumes. The primary duty to furnish reasonably safe place to work with respect to dangers created by the operation of HiLo machine is that of the stevedore and contractor who employed the plaintiff. If you find that the ship's ventilation system was not working properly because of thenegligence of the defendant and that this caused the difficulty, then you can't find the defendant liable. If the defendant knew of the dangers, if any, in the hold and was negligent in not taking corrective action, then you can't find the defendant liable. If you find that the condition which caused plaintiff's alleged injury should have been corrected by the stevedore alone, then you must find for the ship owner.

MR. KORSON: Your Honor, one part of that is where you say that if the jury finds that the ship's ventilation system was not working properly because of the defendant's negligence, I think if we have just shown that the ventilation system of the ship was not working properly and the ship knew about it, it does

not matter whether it was caused by the ship owner or not.

THE COURT: I think it does.

MR. KORSON: What I am saying, if it was not working and the ship knows it was not working and knows there is an excessive amount of fumes in the hatch, then it's a question of knowing whether they exercised reasonable care in having the men work.

MR. DELANEY: Somebody could have drawn that conclusion, but there was no direct testimony.

THE COURT: It's kind of a weak case; it's not clear whether the blowers alone supplied by the stevedoring company were designed to do this job. It would seem to me that that would normally be enough in these cases.

MR. DELANEY: The ship's ventilation system, your Honor, could more than ventilate that hatch if it was on, but somebody has to turn it on and there is no testimony here that anybody told anybody to turn it on.

THE COURT: Then instead of saying working properly I will say it was not working; that covers both negligence and failing to have an operating system and failing to turn it on if it was operated properly.

Is the charge satisfactory to the defendant?

MR. DELANEY: I think it is.

THE COURT: I will now have it typed up.

MR. KORSON: Your Honor, I didn't have an exception to the charge as it was given when we first started, but I have a request to include something your Honor had crossed out on page 3 that the vessel has to provide the plaintiff with reasonably instead of safe with reasonably operable ventilation equipment.

MR. DELANEY: The question is if it's there is it functioning correctly?

THE COURT: Denied. I think we have covered all of that.

You will have one more witness testifying tomorrow morning?

MR. DELANEY: Two, your Honor. The expert and then the gentleman who is going to come in and testify as to Pittston's records. None of these men are my witnesses. They have closed up those piers. Those men are scattered all over the place.

THE COURT: We will give the liability issue to the jury tomorrow and we will keep the same jury, I think, for the jury of damages.

MR. DELANEY: Fine, your Honor.

THE COURT: We might as well get this out of the way.

MR. KORSON: I see I am not going to get it, but I noticed the mate for the deposition tomorrow, and nothing has been said about that. That was at a time we didn't know we would be going to trial tomorrow. You don't have any mates produced?

MR. DELANEY: The ship is not due back here for three weeks.

THE COURT:The case has been scheduled for a long time.

MR. KORSON: Not this trial date, we had noticed the deposition before we were aware of this trial date.

THE COURT: Well, you knew about the trial date for a long time.

MR. DELANEY: I wish I had them here.

THE COURT: All right, see you tomorrow.

(Whereupon, Court adjourned until Wednesday, March 30th, 1977, at 10 AM.)

* * * * * * * * * * *

THE COURT CLERK: Case on trial.

THE COURT: The charge had been corrected and xeroxed and counsel now have copies which has been marked Court Exhibit 4.

I believe it incorporates all of the charges that the parties agreed upon.

Do we have the witnesses for the defendant here?

MR. DELANEY: I do.

THE COURT: Bring the jury in.

(Jury entered the courtroom.)

R E G I N A L D E R N E S T K I N G, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DELANEY:

Q Mr. King, will you tell us your occupation?

A I am Safety Director for the United States Terminal Inc.

Q What is United States Terminal business?

A Stevedore business.

Q The Port of New York?

A Yes.

Q How long have you been a safety director of the United States Terminal?

A Since September 15th, 1971.

Q Would you tell us what your background is, your

education?

A I was Professional Seaman from the age of 14. I was apprentice to the British Shipping Company of Alexandra Stevenson Glascow at the age of 14. I served my time as a cadet and apprentice on the British registered ship until 1941 when I obtained my certificate for second officer on the Australian New Zealand Service. In 1943 I came to the United States and served in the American Merchant Service as an unlicensed member of the American ship and I obtained my American license in 1950 upon obtaining my American citizenship and sailed in the capacity of third officer and second officer and got my chief officer rating when I came ashore in 1957.

Q What are your duties as a safety director?

A My duties are to conduct shipping inspections, to maintain a safe environment for the longshoremen and to conduct investigations in the event of accidents and to keep records for the Federal and State jurisdictional reporting.

Q Are you familiar with the Longshore Harbor Safety Department of Labor Safety Requirements for longshoremen?

A I am.

Q As a part of your job, do you have anything to do with those regulations?

A Yes.

Q What part of your job is related to those regulations?

A To maintain the regulations and see that these are strictly adhered to by the foreman, superintendents and hatch bosses under my control.

Q Mr. King, are you familiar with the use of HiLo's in the hatches in ships in ports of New York?

A Yes.

Q Are there any Department of Labor Safety Regulations that concern use of HiLo's in hatcher vessels?

A Section 1504.93 requires that adequate ventilation be maintained in holds of the vessel while a gasoline or internal combustion machine is working the cargo and also that the ship's officer must be notified whenever a HiLo is placed aboard their vessel so that they can provide adequate ventilation that the ship has in the form of fans or other ventilation systems.

Q Do you have a copy of those regulations?

A Yes.

MR. DELANEY: May I have them marked, your Honor?

THE COURT: Yes.

Do you want them marked in evidence?

MR. DELANEY: Yes.

THE COURT: Mark the whole booklet, but we will

just put in evidence those particular ones. What page are they on?

MR. DELANEY: Section 1504.93 starts on page 27 and goes on to page 28.

THE COURT: Why don't you xerox the particular page and substitute it in case the jury wants to look at them?

MR. DELANEY: I am also interested in page 215-

THE COURT: Xerox the particular portions you want.

MR. DELANEY: All right, your Honor.

THE COURT: Defendant's exhibit A received in evidence.

BY MR. DELANEY:

Q Whose responsibility is it to comply with regulations?

A It is the responsibility of the stevedore primarily.

Q The employer?

A Yes.

Q The section that you referred to 1504.93 does this section require the vessel to have its own ventilators in the hatch on a ship?

A Not necessarily.

MR. KORSON: I object to the form of the question,

and I object to this witness' interpretation of the regulation. They speak for themselves.

THE COURT: No, he is an expert.

I will allow him to answer. What was your answer?

THE WITNESS: Not necessarily so because older ships we don't have adequate ventilation and in that particular case, it's incumbent upon the stevedore to provide portable blowers, mechanical blowers in order to free the atmosphere of toxic fumes which these gasoline machines emit.

BY MR. DELANEY:

Q Is there any requirement for testing the hatch from time to time while the machine is working in the hatch?

A The regulations require that the testing be conducting one hour after the machine has been placed in the hold of the vessel or any confined state and the CO level, which is carbon dioxide level must be maintained at 50 parts per mil. as required by the Department of Labor Regulations. If they exceed that particular level, the machines must be shut down, the hatches cleared of all personnel and naturally were terminated until such conditions are safe for the men to return to the vessel.

Q You said that the first test should be made within

an hour of the time installed?

A Within one hour of the start of the machine working in the vessel.

Q The regulations required periodic tests therefore?

A Yes, every hour on the hour, after the initial test and this must be kept in the log book on the pier for the inspection of the Department of Labor.

Q Now, you just described some level of CO2. Can you relate that if you put a point in front of it?

A The testing device aspirator is used to conduct CO testing. If a test tube which discolors in the presence of CO in the air and it's determined by the amount of coloring which goes from the bright yellow to a dark green. This determines the amount of carbon dioxide present. If it is beyond the 50 per mil which is a color chart from a very slight green which was 50 parts per mil to a dark green which is a dangerous toxic level, if it goes beyond the 50 possible mil, then the operation is shut down.

Q If a record were being kept and they were using the decimal system what would 50 mils be in decimal?

A 50 possible mil, that would be -- in other words, we have columns which state 50, 100, 200 or whatever. 50 and beyond that, if it goes beyond the 50 parts per mil that would be .0005, I think it is.

MR. KORSON: .0005?

THE WITNESS: Yes.

BY MR. DELANEY:

Q So if there is anything less than .0005 then this would be a permissible level?

A Yes.

Q In your experience as a safety director and in your experience as a mate, is it customary for ships officers during the loading of cargo periodically to check the hatches to see if the cargo is being loaded in a satisfactory condition?

A They will make a cursary inspection from the deck of the ship, but it's rare that they will go down into the hold of the ship unless there is something radically wrong with the stow or other criteria.

Q In this case we have testimony that a mate on the ship came down to the hatch while work was being performed and the fellow longshoremen complained to him about fumes.

Now, assuming that to be so, under the circumstances what would be the mate's duty at that point?

MR. KORSON: I object to the form. I don't think that is a correct statement of the testimony.

THE COURT: I will permit it. The jury can decide if it is correct.

A The line of command is usually if the men have a complaint they complain to the hatch boss. The hatch boss in turn will then go to the foreman. The foreman will inform the superintendent that the men are under this condition and the superintendent has the authority from the employer to close the job down if the levels of carbon dioxide or any other dangerous condition exists in the loading or discharging of the vessel.

Q Is it customary for a longshoreman working in a hatch to take orders from a ship's mate?

A No, under no condition whatsoever.

MR. DELANEY: Thank you. I have no further questions.

CROSS-EXAMINATION

BY MR. KORSON:

Q While we are on that point, there is no testimony in this case and assume there is no such testimony that any holdman took orders from a mate. The testimony is that there were complaints made to the men on the deck and this was brought to the attention of the mate and as a result of that the mate came into the hatch.

Do you find anything out of the ordinary with that?

A Not necessarily,no.

Q Now, you are the Safety Director for the United

1 States Terminal?

2 A Yes.

3 Q Who was the Safety Director for Pittston in

4 1973?

5 A I don't know.

6 Q Did Pittston have a safety director in 1973?

7 A That I cannot answer.

8 Q You had some dealing with the Pittston Stevedor-

9 ing in 1973, did you not?

10 A I had meetings with representatives from Pittston

11 New York Shipping Association Safety Committee. At that

12 particular time Ronald Z. Rillo was the man in charge of

13 safety.

14 Q For who?

15 A For Pittston.

16 Q Was he a Safety Director?

17 A That I don't know. He was the man who was

18 handling the safety and the compensation.

19 Q Do you know what his job title was?

20 A No.

21 Q You told Mr. Delaney that it is primarily the

22 obligation of the ship to comply with those safety and

23 health regulations?

24 A I said it is primarily the obligation of the

25

1 employer.

2 Q I'm sorry, the employer.

3 When you say primary to me, that means that it is not

4 only the employer that has that obligation, is that correct?

5 A Under the Federal Act the employer is responsible

6 for the safe working enviornment of his employees.

7 Q But that is not what I am asking you.

8 A And he is responsible for maintaining that

9 criteria.

10 Q Again, that is not what I am asking you. Is

11 it only the employer that has that has that obligation?

12 A Only the employer, yes.

13 Q Are you saying that the vessel has no obligation

14 toward this man working in their hatch?

15 A The vessel has an obligation to provide safe

16 working equipment, yes, but if the employer or the longshoreman

17 uses that equipment which is faulty, then he is the person

18 responsible under the law.

19 Q Are you saying that the vessel does not have

20 in your experience with customs and practices in the Port of

21 New York that it does not have an obligation to give this

22 man a safe place to work?

23 A They certainly do, but the primary is on the

24 employer.

25

If the employer works a ship in a dangerous condition, then he is the person responsible for the safe working enviornment of his men.

Q Primarily?

A Yes.

Q But the vessel also has that obligation, does it not?

A To a certain extent, yes.

Q If the employer doesn't do its job properly, that in and of itself does not relieve the vessel of its obligation, does it?

A It does not.

Q Are you familiar with Joint Maritime Code?

A Yes.

Q Is that a copy of it?

A Yes.

Q May I see that please?

A Yes.

Q Is this a standard of safety practice in the Port of New York?

A That is promulgated by the joint committee OIA New York Shipping Association for the benefit of the employees.

Q Is this a standard of safety?

A Yes.

MR. KORSON: May I have this marked for identification, please?

THE COURT CLERK: Plaintiff's exhibit 3 marked for identification.

THE COURT: What section are you going to rely on?

MR. KORSON: I was going to peruse it, but the first one my eye sees is responsibility and duties of vessels at all times, paragraph one.

THE COURT: Go ahead.

BY MR. KORSON:

Q Now Mr. King, this Joint Maritime Code that we have been referring to which is a safety code in the Port of New York provides that the vessel must give the stevedores, must supply and maintain safe conditions for use to all ship's gear, equipment, tools and work space which is to be used in stevedoring operations?

A That is correct.

Q And that is an obligation of the vessel?

A Federal law supersedes that by placing the onus on the employer.

Q Well, now let's see if we can get a more accurate statement of what you said. Doesn't the Federal law specifically state it does not relieve the vessel of any obligation it has?

A I am not a lawyer, I cannot answer that question.

THE COURT: I will tell you what the law is, ladies and gentlemen. The vessel is not an insurer. I will explain that to you later. It does not have to supply seaworthy place, but it has to act in a non-negligent manner and I will explain what that means.

BY MR. KORSON:

Q Mr. King, moments ago Mr. Delaney was questioning you concerning the exact wording of a portion of the Safety and Health Regulations, did he not?

A He didn't quote the exact words, no.

Q He questioned you on the specific wording, didn't he?

A Yes.

Q And you were familiar with it?

A Yes, but I cannot recite them verbatim.

Q Let me just direct your attention to a specific paragraph Section 1504.2 subparagraph B--

THE COURT: Is that defendant's A?

MR. KORSON: Yes, defendant's A in evidence.

Q Would you please read that paragraph.

A Section 1504.2, it is not the intent of the regulations of this party to place additional responsibility or duties on the owners, operators, agents or masters of the

vessels unless such persons are acting as employers nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulations or custom.

Q I ask you again, is it your understanding that these regulations were never intended to relieve the vessel of any obligation?

A Not according to this paragraph, no.

Q In your experience with foreign vessels in the Port of New York, foreign speaking mates, hasn't it been your experience that they invariably speak English?

A The majority of ship's officers do speak English.

Q Isn't it necessary for them to speak English in order for them to carry out their duties?

A It is.

Q When the stevedores require to provide blowers for a HiLo operation does that mean that the vessel is supposed to keep its own ventilation system shut off?

A No.

Q Aren't they supposed to work hand in hand?

A These are to work in conjection with ship's ventilation systems.

Q They are not designedto do the job by themselves necesarily?

A If enough blowers are placed in the hatch, they can do the job themselves. As I stated before not all ships are equipped with ventilation system.

Q If you assume that a HiLo in a hatch has to be changed two or three times, wouldn't you assume there was something wrong with the ventilation in that hatch?

A Not necessarily.

Q What would that indicate to you?

A If the HiLo had to be changed three or four times this would indicate that there was something wrong with the HiLo, not the vessel. The HiLo is a smoker which emits a lot of fumes not necesarily carbon dioxide, but gasoline or oil fumes. This would create an atmosphere with which the ship's blowers might not be able to dispel, but it would not --

Q That is a ventilation problem. If you have to change the HiLo wouldn't that indicate to you that there was a ventilation problem in the hatch?

A Not necessarily because the ventilator might not be able to discharge allthe smoke, but they would be able to discharge the toxic CO from the confines of the hatch.

Q Now, in your experience with HiLo machines, do you think it's good safe practice to have half the hatch closed above?

A This would be determined on the condition of the

1 cargo in the ship whether the ship's officer wanted half that
2 hatch closed.
3 Q It's the ship officer that determines that, is
4 it not?
5 A The ship officer determines the section of the
6 vessel where the cargo is to be worked. If he wanted the other
7 section covered by protection of the cargo in the vessel then
8 that is his responsility.
9 Q So if half the hatch is closed that is --
10 MR. DELANEY: Your Honor, I think the testimony
11 here --
12 THE COURT:Excuse me?
13 MR. DELANEY: He is misstating the facts.
14 THE COURT: Why don't you allow him to finish
15 the question and then you can object.
16 Ask your question.
17 BY MR. KORSON:
18 Q If half of the hatch is closed because of the
19 cargo on top of the cover, is it the ship that has the auth-
20 ority to direct that cargo be moved and the entire hatch
21 opened?
22 A No, sir.
23 Q The ship has no such authority?
24 A No.
25

Q Didn't you just say that it is the ship that determines where the cargo goes?

A The ship's officers determines which hatch cover has to be opened in order to work the cargo destined for that particular port. If he has cargo in another part of the hatch which is destined for another port other than New York, then he can keep that hatch covered to protect the cargo in the hold of the vessel.

Q That is a determination made by the ship, is it not?

A That is correct because the ship is responsible for all the cargo until it is discharged.

Q Now, what is of greater importance to the ship? The welfare of the men working there or the cargo?

A Both.

Q Is there any emphasis placed on one above the other?

A No.

Q The cargo is as important as the men?

A The men are more important than the cargo.

Q How were the ventilating systems of the vessel operated?

A By the type of vessel.

Q Are there some that are turned on by pressing a

button?

A Usually activated by a switch.

Q This physically, it's an easy thing to do?

A Yes.

Q You have told us about carbon monoxide tests being made because they are dangerous poisons if there is too much. You have also said that there may be fumes emitted and there are fumes emitted other than carbon monixide from HiLo's?

A Yes.

Q Are any other fumes dangerous?

A They are irritating, but not dangerous.

Q They are irritating to the respiratory system?

A Yes.

Q Are any tests made for those?

A The Government regulations only specify the test on carbon monixide.

Q That is all that is tested for?

A That is all the stevedore is required to test for.

Q Does the stevedore do more than the law requires them to do?

A He has to do everything that is required under the law and sometimes more than the law requires, In order

to have a safe enviornment.

Q Does the ship have any requirements under the law?

A Yes, as are specified in here.

Q The only thing that is specified in there referring to the safety health regulations is that the duties on the stevedore doesn't relieve the vessel of it, but it does not state what the vessel's duties are. I want to know where you find what the vessel's duties are.

A The American vessels are governed by the United States Regulations. Foreign vessels have their own particular agency who governs their responsibility.

Q We are talking about a Brazilian shipping company here. Do they have any safety requirements of their own?

A Yes.

Q Are you familiar with them?

A No.

Q Do you know if they exist in this case?

A They probably do.

Q Do you know that they do?

A Not specifically, no.

Q Who is it that physically opens and closes the hatches?

A The people, that is determined by the design of

the vessel.

If the vessel has mechanic hatches then the ship officers operate these mechanical type hatches. If the vessel has hatch boards and beam type of structure throughout the main deck and tween deck area then the longshoreman removes these hatches.

Q Are you familiar, I assume you are, are you familiar with the duties of an officer, ship's officer who is doing his job properly?

A Yes, I am familiar with that question.

If it is brought to the ship officer's attention that there is an excessive amount of fumes in a hatch which are causing the men to cough and complain and he does nothing to see that work is stopped, is he doing his job properly?

A For the protection of the vessel he can notify the stevedore to take the men out of the hatch.

Q Doesn't the --

A But the stevedore has full control over the men.

Q Doesn't the ship's chief officer or captain have the authority to tell the stevedore stop you men from working?

A Definitely.

MR. KORSON: Thank you. No further questions.

REDIRECT EXAMINATION

BY MR. DELANEY:

Q Mr. King, if a HiLo is being used in the lower part of a hatch and only half of the hatch above was opened, it does not necessarily -- it isn't necessarily in a safe condition?

A Yes.

Q It would or not?

A It would.

Q I am talking about if you had ventilators in the hatch --

A If the hatch is adequately ventilated it's a normal condition.

Q I ask you if half open hatch, the hatch were open and they were using HiLo's in the lower part of the hatch would this necessarily be an unsafe condition?

A No.

Q Now, you were asked some questions about ship ventilators. This was number two hatch of a ship, that is the testimony. Ordinarily, if you are down in a hatch was there any way whether the ship's ventilators were working from the noise being produced?

A No.

Q Where in your experience are the motors that run these ventilators located?

A I just didn't hear that too well?

Q Where would the motors be that would run the ship's ventilators?

A They are located in the major part of the vessel in a deck housing located actually away from the hatch and they are either inthe forward or aft end of the vessel.

Q In a normal situation in your experience being down in the hatch, can you tell by the noise whether they are working or not?

MR. KORSON: I object to the form.

We are talking about a specific ship, a specific ventilating system and this witness has no way of knowing whether this ventilating system made noise or not. He has testified that he doesn't know this ship.

THE COURT: Do you know this ship at all?

THE WITNESS: I don't even know what ship this was on.

BY MR. DELANEY:

Q It was the ship Itapua.

A I am not familiar with that vessel.

Q Now, are you familiar with Brazilian ships in general?

THE COURT: No, that is not a useful question. There are too many types of ships.

BY MR. DELANEY:

Q Mr. King, the last question you were asked about is a mate --

So, assuming the facts as Mr. Korson said that the mate was up on the deck and he was told or given various complaints by longshoremen and he came down into the hatch. Assuming at that time complaints were that the HiLo's were smoking. There was a lot of smoke in it. Does this necessarily indicate an unsafe condition in the hatch?

A No.

Q The way they test for unsafe conditions would be to use this procedure that you talked about previously.

A That's correct.

Q Now, that is not the ship owner's duty?

A That is correct.

Q I think you told us that if the reading on this device would be .0005 it became dangerous?

A About that level, yes.

Q What in your opinion would .025 mean?

A 50 possible mil.

Q Which is what,one hundred times less?

THE COURT: No.

.025?

THE WITNESS: .0005.

THE COURT: .005 is the danger level.

If you get to .025 it's extremely hazardous?

THE WITNESS: That is correct.

50 parts per mil, parts of air, 50 parts of carbon monoxide per mil parts of air.

THE COURT: I don't know how --

THE WITNESS: Above that level then this condition would be considered dangerous alone.

THE COURT: I don't know as I say how they mark these things, .005 would not be the normal way of saying 50 parts per mil, but, if that is their procedure we will assume it is.

Do you have any of these records?

MR. DELANEY: Yes, well, I am going to have to produce the next witness who willtestify to that.

THE COURT: Where are the records?

MR. DELANEY: I have a copy of the records.

THE COURT: Let's see them.

Mark them.

THE COURT CLERK: Defendant's exhibit B inevidence.

Let me see them.

THE COURT: Is this a xerox of the original log?

MR. DELANEY: That is a copy of the log.

THE COURT: My question is this a xerox copy?

MR. DELANEY: It's a hand copy of the original log.

THE COURT: Who hand copied it?

MR. DELANEY: An employer of Pittston.

THE COURT: Where is he?

MR. DELANEY: He doesn't work there anymore.

THE COURT: I can't take this, it's not sufficient. Is there anybody who says this is what was in that book that he knows?

MR. DELANEY: I believe the witness who is coming will be able to identify that it comes from the book.

THE COURT: Then just mark this for identification.

THE COURT CLERK: Defendant's exhibit B for identification.

THE COURT: This witness doesn't know what the person who marked this down meant by .025; so this is really useful. Mark it for identification.

Thank you, you may step down.

Where is your next witness?

MR. DELANEY: Can I mark a couple of exhibits now while we are waiting?

THE COURT: You may.

MR. DELANEY: I would like to offer three pages from the Long Island College Hospital records the entire

record is coming and I would like to offer that later.

THE COURT:If it gets here otherwise we'll take these three pages.

THE COURT CLERK: Defendant's exhibit C in evidence.

MR. KORSON: Your Honor, the only objection I have I don't see what bearing it has since we are only trying the liability aspect of it.

MR. DELANEY: It has to do with the history.

MR. KORSON: Very well.

THE COURT CLERK: Defendant's C marked in evidence.

THE COURT: What else do you have?

MR. DELANEY: The record from the Medical Center in Brooklyn.

THE COURT: Mark it in evidence.

THE COURT CLERK: Defendant's exhibit D in evidence.

THE COURT: Do you have anything else?

MR. DELANEY: Nothing.

THE COURT:All right, ladies and gentlemen of the jury, we will now take a fifteen minute break while we try to get the next witness ready.

(Jury left the courtroom.)

(Whereupon, Court recessed.)

THE COURT: Bring the jury in.

(Jury entered the courtroom.)

E D W A R D B E D E R W I T Z, residing at 568 Scarsdale New York, having first been duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. DELANEY:

Q What is your present job?

A I am employed by Pittston Stevedoring Corporation as an insurance manager.

Q Was that your job in June of 1973?

A Yes.

Q Have you appeared here at my request and brought your file with regard to Antonio Marrale?

A Yes.

Q Does your file indicate when you first had notice of an injury to Mr. Marrale?

A Yes.

Q What was that date?

A June 14th, 1973.

MR. KORSON: I object.

I move to have the answer stricken. I object to testimony from the witness' file. We don't know the source of the information.

THE COURT: If you want him to mark the file -- is this a business record?

THE WITNESS:Yes, sir.

THE COURT: Do you want the whole file marked?

MR. KORSON: Yes.

BY MR. DELANEY:

Q Mr. Bederwitz, to whom was the initial report made?

A To me.

Q Did you prepare a report in line with what Mr. Marrale told you?

A Yes.

Q Do you have that report with you?

A Yes.

MR. DELANEY: If I may, your Honor, can I have a copy of this report marked for identification?

THE COURT: Yes.

THE COURT CLERK: Defendant's exhibit E marked for identification.

BY MR. DELANEY:

Q Do you have a copy of that report?

A Yes.

Q Thatis one page?

A Yes.

Q That is one page?

A Yes.

Q Mr. Bederwitz, how did you get a report of Mr. Marrale having been injured?

A Mr. Marrale came to our office. At that time it was located at 17 Battery Place on June 14, 1973, to report an accident of an incident or something that occurred to him on approximately May 31st,1973.

Q Do you speak Italian?

A No.

Q Did you talk to Mr. Marrale in English or in Italian?

A When he came into the office he spoke nothing but Italian, verybroken English, and I really couldn't understand him. I employed the use of one of our secretaries who speaks Italian and writes it fluently. I asked her to help me speak to Mr.Marrale which she did and translated it for me.

Q Did you prepare a report on what Mr. Marrale told you that day?

A Yes.

Q Is this the report, superintendent's report of accident?

A That's right.

Q That is the report you have in front of you?

A Yes.

Q Is that your signature on the bottom left hand side?

A Yes.

Q Is it part of your company's business to prepare reports such as this in regard to accidents which happen to employees at Pittston?

A Not usually, no. Usually they are reported to the timekeeper at the pier. It is the company policy that if a report is given days after an alleged incident, then they must come to the New York Office to give the report to me.

Q If they come to the New York Office this type of report is regularly made?

A Yes.

MR. DELANEY: I want to offer that in evidence.

MR. KORSON: May I have a voir-dire, your Honor?

THE COURT: Yes.

VOIR-DIRE EXAMINATION

BY MR. KORSON:

Q What is the name of the secretary who was the interpreter?

A Theresa Rivirso.

Q Has she been hired as an interpreter?

A No, she was a secretary.

Q Do you know if her translation on what Mr. Marrale said was accurate?

A To my knowledge it was accurate.

Q But do you know it for a fact?

A I don't speak Italian.

Q Do you know if her translation was accurate?

A According to myself Mr. Marrale and Miss Rivirso at the time, there seemed to be no lack of communication.

Q That is according to what she said to you?

A Apparently Mr. Marrale was satisfied too.

Q That is what Mr. Rivirso said to you, is that correct?

A I was present at the time this was going on. I asked the question, she asked him it in Italy, he answered, she gave me the answer back.

Q But you didn't understand him and he didn't understand you, you both relied on Miss Rivirso?

A That's correct.

Q If there is anything incorrect in that document before you, would you agree with me there are only two possibilities that Mr. Marrale was mistaken or the translation of Miss Rivirso was not accurate?

A Can you repeat that?

(Whereupon, the last question was read back.)

BY MR. KORSON:

Q Would you agree with that?

A That is a supposition, but I will agree to it.

Q Is there any other possibility than those two?

A I had no problem.

Q Is there any other possibility if there is any mistake in that report, is there any other possibility then that Mr. Marrale did not state what was in that report or Ms. Rivirso did not accurately translate it?

A I would agree.

MR. KORSON: I object to this document, your Honor.

THE COURT:Overruled.

The jury will consider this factor.

BY MR. DELANEY:

Q Do you know as of May 31st, 1973, did Pittston have a safety director?

A We did not have employed one person with a title of safety director, we did not.

Q Does Pittston have one now?

A No.

Q Item 10, will you explain to us what that means?

A Yes.

Mr. Marrale was paid until 9 P.M. that day, but he only worked until 7 o'clock that day.

The reason being that the ship sailed shortly after 7 o'clock and OIA Contract they were paid until 9.

MR. DELANEY: I have no further questions.

CROSS-EXAMINATION

BY MR. DELANEY:

Q Incidentally, before I get to anything else, the report that you have been referring to is that the one that you wrote at the time?

A Yes.

Q Is that the only one that was ever prepared?

A Yes.

Q Wasn't a typed one ever prepared?

A It was a typed form sent to the Department of Labor.

Q Where is that?

A I have it here.

Q May I see it?

A Yes.

Q The typed form that you just gave me the information there is based upon your handwritten one?

A That's right.

Q And the handwritten one came before the typed one?

A That's right.

MR. KORSON: May I have this marked for identification?

THE COURT CLERK: Plaintiff exhibit 4 marked for identification.

BY MR. KORSON:

Q Now, as the insurance manager for Pittston one of your jobs was to get copies of medical reports from Mr. Marrale, is that correct?

A Right.

Q And you have medical reports at least one probably more from Dr. Dunaway in your file, is that right?

A Yes, I do.

Q Would you see if you have his first report?

A Do you have a date?

Q I think it was -- I cantell you the date of the first visit, the first visit was June 13th.

A I have a report here dated June 14th, 1973.

Q All right.

A I don't know whether that was his first report or not.

Q All right.

A But I have that report.

Q Now, excuse me. If I can direct your attention to that report, that report indicates the day Mr. Marrale first visit to Dr. Dunaway?

A Yes, it says date of first visit.

Q What was that date?

A June 13th,1973.

Q That was the day before you took your hand-written report.

A That's correct.

Q Don't you say in your handwritten report that Mr. Marrale was not under a doctor's care at that time and he wouldn't tell you what doctor he wanted to see?

A That's correct.

Q So you would have this jury believe that Mr. Marrale although having gone to the doctor the day before, the following day, told you that he was not under a doctor's care, is that correct?

A That is what he told me and that is what I put down.

Q That'sir the secretary accurately translated what he said, is that right?

A That's right, but she is good.

Q Where is she now?

A She is living in Brooklyn.

Q Does she still work for you?

A No.

Q Do you know where she lives?

A No.

Q But you could find out?

A Yes.

Q Do you know if she is coming to Court?

A No, sir, I doubt it, she wasn't asked.

Q Mr. Delaney asked you to come to court?

A Yes, but he did not ask for the interpreter.

Q He didn't ask for her?

A No, he did not.

Q Mr. Marrale told you that he had been having physical problems because of gas and fumes?

A That is what he said on the report, it speaks for itself.

Q He told you that he was taken by ambulance to the Long Island College Hospital?

A That is what the report states.

Q At 2:30 in the morning?

A That is what he told us.

Q He was at the hospital until June 8th?

A That is what he told us on June 14th.

Q You have listed here the names of a witness to the accident, Mr. Giovanni?

A That is what he told us.

Q Do you have available to you the records of the

1 names of the gang members of Mr. Bosco's gang?

2 A No.

3 Q Didn't you at that time?

4 A No.

5 Q If Mr. Giovanni worked for Pittston and you were

6 the insurance company, the insurance company manager for

7 Pittston, didn't you have available to you the records of who

8 worked for Pittston at that time?

9 A Yes. Mr.Giovanni worked on Thursday, May 31st,

10 1973.

11 Q You have investigators working for you?

12 A Yes, we do.

13 Q Did you ever have Mr. Giovanni interviewed?

14 A Not to my knowledge.

15 Wait a minute, we tried to locate Mr.Giovanni and we

16 could not find him, but Mr. Marrale had listed him as a witness

17 to his accident.

18 Q What efforts were made to locate him?

19 A We obtained a gang list for the claimants.

20 Q That gives you the names and waterfront number

21 of every member?

22 A That's right.

23 Q Was Mr. Giovanni's name there?

24 A No, he might have been an extra man. We went back

25

to the time sheet and ran down every man. The only conclusion that we came to at the time was that Mr. Marrale might have mistaken Giovanni as a nickname or something else for another member of a gang.

Q Or maybe your secretary didn't get the name right, is that possible?

A I heard the name, I wrote it down.

Q You heard that?

A Yes.

Q After you attempted to find this man, Mr. Marrale was still an employee of Pittston, wasn't he?

A On June 14th, no.

Q After you attempted to find Mr. Giovanni, was Mr. Marrale an employee of Pittston?

Did he work for Pittston?

A That I am not sure of unless I go through this file again.

Q You couldn't find Giovanni. Did you go back to Mr. Marrale and ask him who he was talking about?

A No.

Q Or where he is?

A No. At that point he had obtained the services of an attorney and I knew once he did that he wouldn't speak to us.

Q How did you know that?

A Because we got notices in on that.

Q No, how did you know Mr. Marrale wouldn't speak to you then?

A That is normal procedure in the industry. Once they get an attorney we do not speak to the claimant.

Q Did you speak to his attorney?

A If I have to.

Q Did you ever ask us where this Giovanni is?

A No.

Q How did Mr. Marrale know to come to your office that day?

A He was told by the timekeeper.

Q When was he told that?

A He could have been told on the 14th or the 13th, I am not sure.

Q Did you ever question your timekeeper about this?

A Yes.

Q When?

A On the 14th I called him up and I said, "What is this all about?" And he said, "We have no record of any incident ever being reported,no complaints ever being made, so we sent him to New York for you to take a report."

Q So you called them after Mr. Marrale came to you?

A No, while he was in the office I spoke to the timekeeper.

Q You called him after Mr. Marrale arrived?

A That's correct.

I didn't know Mr. Marrale was going to arrive until he showed up in my room.

Q So this out of the ordinary procedure whereby a man reports an accident to you, to the manager, was something you were not anticipating because the timekeeper didn't tell you that he was coming, did he?

A That is correct, but it's not out of the ordinary. It's standard companyprocedure.

Q When an accident is not reported on the date that it occurs, it can be reported to the company, but that is not an ordinary occurrence, is it?

A No, not usually. Usually any accident that occurs is reported immediately to the timekeeper.

Q Was he told to see you specifically?

A He was told to come to see -- I don't know what he was told.

Whether he was told to come to me specifically or he was told that he had to go to Pittston Insurance Department

to report the incident.

THE COURT: Let's move on to something else.

MR. KORSON: Very well, your Honor.

BY MR. KORSON:

Q You still work for Pittston, do you not?

A Yes.

Q When a man is injured on the job that is probably going to cost Pittston money, is that right?

MR. DELANEY: Your Honor, I will object to this line of questioning.

THE COURT: Yes.

THE WITNESS: Pittston Stevedoring Corporation at the time of this incident was insured on May 31st, 1973, by the Gulf Insurance Company.

BY MR. KORSON:

Q That is who you worked for?

A Pittston Stevedoring Corporation, yes. We paid our compensation premium to the Gulf Insurance Company.

Q And the more accidents that occur the bigger your premiums are?

A At a level, yes.

Q So ultimately this man's injury is going to cost your employer money?

A I cannot say that, no.

Q Do you remember Mr. Marrale being in your office, a specific recollection, or are you testifying from documents that you see in front of you?

A I saw Mr. Marrale once on June 14th, 1973. He came into the office. That is the last time that I saw him. He did have his I.D. card with him and I looked at that. It was Mr. Marrale's I.D. card. I gave it back to him and we proceeded to make out the report of the accident.

Q So as you are sitting here now, you are telling us not only what you read from the document, but you have a specific recollection of Mr. Marrale on that day?

A I have a specific recollection of Mr. Marrale coming into the office for the simple reason that I did take the report, that I did need the services of an interpreter and everything went along smoothly.

Q When did you first find out you were coming to court today?

THE COURT: Will you please bring this to a close?

MR. KORSON: Very well, your Honor.

BY MR. KORSON:

Q In the handwritten report which we have in evidence, you have a specific description of the accident, is that

right, as you say it was given to you by the interpreter?

THE COURT: This is defendant's what?

MR. KORSON: Defendant's E in evidence.

BY MR. KORSON:

Q Is that correct?

A That is correct.

Q Now, in the typed report plaintiff's exhibit 4 for identification, you have no such specific description, you only have a bear statement that you had no knowledge of any accident, is that right?

A That is correct.

Q In the written description that you prepared initially you have a hatch and a deck, hatch #2 lower hold and a time described, is that right?

A That is correct.

Q But in the typed one that was done afterwards you sent to the Federal Department of Labor when they asked the exact place where the accident occurred you said unknown, is that right?

A That is correct.

MR. KORSON: I offer typed report plaintiff exhibit 4 in evidence.

MR. DELANEY: No objection.

MR. KORSON: No other objections.

REDIRECT EXAMINATION

BY MR. DELANEY:

Q Mr. Bederwitz, does your file reflect benefits were paid to Mr. Marrale?

MR. KORSON: Objection.

THE COURT: Sustained.

BY MR. DELANEY:

Q Mr. Bederwitz, does your -- do you know if Gulf --

THE COURT: Please don't ask any further questions about that.

MR. DELANEY: Your Honor, may I approach?

THE COURT: No.

MR. DELANEY: Mr. Korson raised the point that he may have some prejudice here.

THE COURT: Ladies and gentlemen of the jury, forget about that. Forget about the insurance and just decide the case as I will instruct you and forget about that aspect of it. It has nothing to do with the case. You are to decide the case on the facts and the law.

Thank you, sir, you may now step down.

Next witness?

MR. DELANEY: I have no further witnesses, your

Honor.

MR. KORSON: None for the plaintiff on liability.

THE COURT: All right, I will hear your motions later.

We will now have summations.

(continued next page)

MR. DELANEY: Your Honor, Mr. Korson, ladies and gentlemen of the jury: As we started off speaking to you about what we were going to try and prove it is now the time when we go through what we call summations in which we try to lay out what was proven, draw yourinferences and suggest to you inferences that you can draw and make whatever comments we have on the evidence.

As his Honor will say it's the recollection of evidence of what was said from the witness stand and what is in the documents that are evidence. If there is a controversy I suggest that the testimony could be read back, but it is your recollection of what occurred. It isn't what I said or what Mr. Korson said that counts; it is only what the witnesses said and what is in the documents.

It is your job to decide the facts. This is the last opportunity we will have to talk to you and during the course of my summation there might be items which I may neglect to mention and Mr. Korson might mention things and since I will not have a chance to get up and say anything again, I hope you will think if I thought what Mr. Korson said I would give an answer.

Now, we put in evidence this document which is

1 defendant's A and the part that I was going to xerox
2 and which I did is on the second page Section 1504.2,
3 it says scope and responsibility. Section A, the
4 responsibility for compliance with regulations of this
5 part is placed upon employers as defined in 1504.3C.
6 Then there is a Section B which Mr. Korson read to
7 Mr. King, it is not intended by these regulations to
8 place additional responsibilities or duties on owners,
9 operators, agents, or masters of a vessel unless such
10 persons are acting as employers; nor is it intended
11 in these regulations to release such owners, operators,
12 agents or masters from responsibilities or duties now
13 placed upon them by law, regulations or custom.
14 Now, further, in this book on page 27, Section
15 called 1504.93, ventilation and atmospheric conditions
16 and this is what Mr. King was talking about requirements
17 of stevedores to test the hatch while the hilo's were
18 down there being used. He also talked about the
19 ventilators, the blowers and the responsibility as he
20 understood it.
21 Now, in this case as I started to say in the
22 opening statement, you don't have to leave all of your
23 experience behind, things happen to you in your
24 own life that have happened before, things that you
25

have seen happen. I would suggest this fact situation is something like if you hire an electrician to work in your house. Of course, this person doing the work creates a condition. For example, leaving the electrical cords on the floor and he later stumbles over his own cord and I would suggest that there is an analogy to be drawn here. Although electrical cords laying on the floor may not be in itself dangerous neither is a HiLo. It's a gasoline, like most of the cars you drive, cars that are on the street and it's the same kind of fumes emitted. The fumes in and of themselves are not dangerous.

The plaintiff here claims that the condition created that day under those conditions were dangerous. For the moment let us review Mr. Marrale's testimony.

In the first place, he said they went down in the hatch and very soon after the HiLo started, there were complaints. His complaints were essentially of smoke not of anything else, but the HiLo was smoking. I am sure any gas machine if it is not properly serviced or maybe if it's getting old would burn too much gasoline or too much oil and it will smoke. The car does the same thing.

He complained he said to someone up on the deck.

Now, I tried to establish from Mr. Marrale exactly who he complained to and essentially my recollection is that he complained to his gangway man who he said was one of the members of his gang. I don't know if there was any controversy about that.

Mr. Marrale probably was handicapped by the fact that he could not or doesn't speak English well. He said he did talk to his gangway man and he complained. He also complained to someone else up there, but he said he doesn't speak Portuguese and does not speak English very well so I suggest to you it's unlikely that he complained to anyone else or that anyone else understood him.

In any event, he said that he complained to his gangway man. He said that he never saw Mr. Bosco all day or complained to him. He saw Mr. Bosco look over the hatch. He continued working.

After lunch they went to another part of the hatch and they continued working. Now, I asked Mr. Marrale about the blowers and I don't recollection whether he said they were there or not, but the other witness said there were two of them there and he described them. I think Mr. Marrale said they were there and he did or didn't remember whether they were working

1 properly, but I asked him about the ship's ventilators
2 and he described some device overhead and I tried to
3 establish from him how did he know if they were working
4 and he said they weren't. How did he know? He said
5 they just weren't working. I asked him could he reach
6 up and touch them and feel them and I don't remember
7 what his answer was, but he was answering by saying
8 that he didn't remember most of the time.
9 Now, once again, if your recollection of what
10 he said but I suggest to you that Mr. Marrale and his
11 witness both of whom said that the ship's blowers were
12 not working; his witness said when asked how did he know
13 they were not working, he said that he couldn't hear
14 them.
15 You heard Mr. King's testimony that the motors
16 from the blowers are not located in the hatch or even
17 near the hatch; that it's not likely you could have
18 heard them anyhow.
19 Mr. Marrale concedes that he never left the
20 hatch although he said that he was feeling dizzy in the
21 middle of the afternoon and he worked until 7 o'clock.
22 When he left the pier, he didn't complain to anybody,
23 he didn't complain to Mr. Bosco and he didn't complain
24 to the timekeeper.
25

Now, he went home. During the night we have various kinds, but in any event, Mr. Marrale awakened with pain or discomfort, whatever it was he felt. He talked to his wife and he was taken to the hospital. Now, the hospital records are in evidence. Ifyou look on here some place it says 5AM. he was admitted, right up over here in front of defendant's exhibit C, time out 5 o'clock on the 8th.

Now, when Mr. Marrale went from there, the front of this is the history, have you ever been in hospital and talked to a doctor, and they ask you what is wrong with you. They want to find out your complaints so they can treat you and it says here, this document is available and you can read it, patient states that he was awakened this morning by tight burning pain in the chest. I don't know what that means. Shortness of breath, became difhratic.

The next line, no history of heart disease or hypertension, and then it goes in to what they found.

On the third page, it is very hard to read, but it's typed in and it says under remarks, PT wife. Then there is a dash and there is AD him - Inter flores. Now, we don't know what that means but Mr. Korson when he has a chance to talk to you very likely he will say

1 nobody understood Mr. Marrale when he went into the
2 hospital. This history was taken, it's not necessarily
3 accurate because it was not taken by somebody who under-
4 stood it.
5 I suggest to you that Inter can mean interpreter.
6 I am not sure it does.
7 At that point there is no mention of breathing
8 fumes. There is no mention of a ship or anything else
9 just that he woke up in the night. Mr. Marrales got
10 out of the hospital on the 8th of June. He went and
11 reported, by his own testimony, to Pittston about the
12 13th, reported it to the timekeeper and the timekeeper
13 told him to go and report it to someone else. He pro-
14 bably did that.
15 The next day in the office in Manhattan Mr.
16 Bederwitz told you what he said. At this point he said
17 that he worked all day in gas and fumes, he also said
18 in answer to a question by me, I asked him, when he
19 got out of the hospital did he go and see a doctor and
20 he said no, not right away, and I asked him who sent him
21 to Dr. Dunaway and he said his lawyer. So he went to
22 see his lawyer in between the time he got out of the
23 hospital and the time he went to the superintendent or
24 Mr. Bederwitz and reported this.
25

Now, we are here about gas and fumes in the face. Mr. Bederwitz testified that he was not much of a help because he couldn't remember everything although he did remember a couple of important facts. He did not know that anything was wrong in the hatch or that anyone was sick or anyone was being disturbed on May 31st. He said he first found out that something was wrong with Mr. Marrales the next day when somebody told him he was taken to the hospital, but he didn't know why. He said that he never talked to him about it and he still doesn't know any of the facts.

Mr. Bosco said if anybody reported to him that there were excessive fumes he checked it out himself and he would have shut down the job or gone to his boss and ask him to shut it down, but he said that he didn't shut it down or maybe some of his answers were that he couldn't remember. Some of them -- I think he testified he couldn't remember this particular day whether he shut down the job, but he said that it is what he would have done if he was notified. He said he was available that day around the hatch. He very probably went down to the hatch because they were changing these HiLo's and he doesn't remember any complaints made to him. He is a boss and he has been a boss for quite a

while. I think he said it was about 15 years, apparently a responsible person otherwise he wouldn't have been a boss that long. These are his men and they work for him all the time. He obviously isn't going to leave them in the hatch in an unsafe condition. He would have done something.

He didn't do anything. I suggest you can draw the inference because there was nothing wrong at least nothing dangerously wrong.

I am not disputing that there were fumes down there, there was smoke from the HiLo's. The question is whether it was such that under the law imposes a responsibility to do something about it. That is something you will have to decide.

You heard the testimony of Mr. Marrale that he went out and saw Dr. Dunaway for a period of time.

We have two parts in this case, one is were there excessive fumes in the hatch, excessive to the extent they were dangerous and two, were the ship's ventilators in any way responsible for this.

Now, I mentioned this before that I think Mr. Marrale in general said they weren't working. His witness Mr. Peritre said they were not working because he didn't hear the noise. He might have well, very

well have said something else, but that is up to yo to decide, but I asked both of them if they ever told the mate these weren't working and, I believe, the answer is no. No one ever told him.

Now, there is testimony that somebody as to a complaint made that he did come down and Mr. Peritre said the mate came down to check the cargo and they made some remark to him and the mate went like that, gesturing. At that point assuming that there were fumes there I would suggest to you there are always fumes where HiLo's are being used and consequently the gesturing means nothing because the mate had nothing to do he couldn't tell the company what to do or not to do it was not his job to do it. If the complaints were being made to him it was not his HiLo either and he had no responsibility to replace it.

The stevedore, Pittston, they really have nothing to do with this case. They are not a party. The men who worked on the piers, the timekeeper, the man who makes out the accident reports for Pittston, they have no, at the time this was reported, they have no responsibility, no feelings one way or the other about Mr. Marrale or what happened to him. Their responsibility was to provide a -- well, they had

1 certain responsibilities and there is no question here
2 whether they did or didn't do these things, but when
3 they submitted what is plaintiff exhibit 4, I think, to
4 the Department of Labor the employer's first report of
5 accident, they put no knowledge of the accident.
6 Mr. Bosco said that he had no knowledge and he
7 was the boss. This is now on the 13th or the 14th of
8 June which is two weeks after the accident. At that
9 point, apparently, Pittston had no knowledge of it.
10 Consequently, it would figure this is what they were
11 doing they wrote down on the report name of foreman,
12 Bosco. Mr. Bosco said that he knew that the man got
13 sick, but what did they think was wrong with him because
14 he went into the hospital they thought he had a heart
15 attack. Fortunately for him he didn't because they
16 ruled out that he was suffering from a heart attack and
17 when we get to that part of the case we will have the
18 entire record and the doctor here to tell us what they
19 said.
20 Now, there is an issue here, another issue,
21 which you have to decide and if you ever sat on jurys
22 before maybe you heard about a thing called contributory
23 negligence. In Maritime Law it is also called
24 Comparative negligence. It works, as his Honor
25

will tell you, on a percentage basis.

You can find zero percent or whatever percent you want to find, but here it's my job to convince you of contributory negligence. On the rest of the case it's Mr. Korson's job, he has the burden of proof. He has to establish his case, he has to prove each and every element of it to your satisfaction. I don't have any duty to disprove his case.

If somethings are missing in this case it is not my job to bring it out or get evidence or witnesses to help him prove his case. That is his job. The only burden that I have here is what we call contributory negligence, that is, did the plaintiff in some manner or fashion contribute to his own condition. I submit he did.

You might be thinking this is kind of contradictory to argue first that there is no responsibility on the part of the ship owner and then argue if there is it's really Mr. Marrale's fault. The law is full of contradictions and this is why we have to do it this way.

Mr. Marrale by his own testimony is an experienced longshoreman; he has worked with HiLo's before and worked in hatches before in HiLo's. During this day he

said that these fumes were causing him to cough. His testimony is that he originally left the hatch for one hour which is customary and that from one o'clock until 7 o'clock as far as he can recall he never left the hatch, he didn't even go up to the hatch for a break. He didn't go off for coffee and I suggest to you that during this period because he said he also never complained to Mr. Bosco, in other words, he was working there, made no effort on his own to do -- if he was not getting enough fresh air or suffering in any way, to go up on deck and get some fresh air or do anything about it. He continued to work according to his own testimony even after he felt dizzy, he sat down in the hatch and then he went up and worked until 7 o'clock and left.

Now, last, I think both Mr. Marrale and the other gentleman, about -- the cargo comes in big cases and pallets and then a HiLo picks it up and stows it. The hatch is a round, something like that, and they put the cargo in the corners and then in the middle. The HiLo does the work. They were just unhooking the cargo that came down. So I ask you to consider that these men there were eight men in the hatch to unhook that one or more of them at a time could have gone out of the hatch.

Mr. Marrale made no effort to leave the hatch. His only testimony here was that he complained to his signal man who apparently did nothing else than to replace the HiLo once, twice or three times during the day.

Mr. Bosco said it was replaced once; Mr. Marrale said it was replaced two or three times. If Mr. Marrale really felt that there was something wrong, I submit to you he would have gotten out of the hatch because his life is dear to him,as to all of us, and self preservation is a very important factor and he would have gotten out of there fast. So would the other men.

Now, nobody else got sick; no one else reported anything here. These men, all of them --

MR. KORSON: Excuse me, there is no testimony offered in this case that nobody else got sick and Mr. Delaney is trying to tell the jury something that is not in evidence.

THE COURT: I don't remember any such reports.

MR. DELANEY: My recollection is that Mr. Bosco was asked whether anyone else got sick and he said no; but it's your recollection that counts.

I submit to you that if no one else got sick then this probably indicates that the conditions there

no matter what they were were not such requiring any action least of all on the ship.

Their testimony here as duty of stevedore. They hire their own men, their equipment; they come aboard the ship, they are experts and their job is to load and unload. Under the circumstances it is their responsibility, as Mr.King said, to stop work, to test, to do the various things for the protection of their own men. If these things were not done, it is not the ship owner's responsibility. It was the stevedore's responsibility and they can't, at this point, try and pass it off on someone else saying it's not my responsibility it's yours.

I would like to thank you for your kind attention and interest in this case, and I hope after hearing his Honor's charge and considering the testimony that you will find here that this ship owner was not responsible.

(continued next page)

MR. KORSON: Your Honor, Judge Weinstein, Mr. Delaney, Madam Forelady, ladies and gentlemen of the jury: There are many feelings that have been aroused in some of Mr. Delaney's statements, but before I get to any of them and before I make a response, I would like to get to them as quickly as possible, I want to thank you for your patience in sitting here. I know it's not easy for you to come in out of your own lives and judge something that is entirely separate and apart from you and it is difficult. This is a very important duty and you have all been attentive to the end and I think what you were supposed to do so far you have done and I thank you.

This case has a good deal of significance to people other than Mr. Marrale and Mr. Delaney's client because your decision is going to determine, in effect, what is considered to be safe, proper, working conditions aboard a vessel for any longshoreman and what the vessel's responsibilities are; that is an important job that you have.

At the outset of Mr. Delaney's summation to you, he asked you to bear in mind and try to formulate what he would say in response to any points that I make now which he didn't address himself to.

I often hear defendants attorneys said this and I often wonder why they do that because it's not your job to be the lawyer for the ship; it's not your lawyer to look for answers to everything that I say and to try to find answers for everything that I say on behalf of the ship. If things occur to you by your own reasoning and logic which you view as wrong, it's not sensible, fine, disagree with it; but don't go out of your way to find answers to what I say to you if you agree with what I say just as I won't ask you to think of every point he made and look how I would answer that. You are not Mr. Marrale's attorney and you are not the ship's attorney; you are here to decide the facts fairly and impartially.

We are not asking for sympathy in our verdict; sympathy is not something that belongs in a courtroom. We only seek justice at your hand.

The issue here is did the vessel act reasonably? Did it give Mr. Marrale a reasonably safe place to work? Simple as that. It's not a question of technical, legal terms; negligence, reasonably safe place to work. No matter how much you may think the stevedore should have done here or no matter how you think the stevedore was wrong, the stevedore is not on trial here. I didn't

sue them and he didn't bring them into the case. The only question is did the ship do anything wrong? If they did one thing wrong and the stevedore did one hundred things wrong, the ship still did something wrong and you should find for Mr. Marrale.

Now, you were told at the outset that everything Mr. Marrale was going to claim to you would be disproved. Let's look at what the testimony of the evidence was as you recollect.

Mr. Marrale described and every witness who was there that day agreed, Mr. Bosco and Mr. Peritrie, that the HiLo was changed more than one time. There were two HiLo's. Mr. Peritrie remembers two or three; Mr. Marrale remembers the same. Mr. Bosco doesn't say it wasn't changed two or three times, but he remembers one time that it was changed, more than that he does not remember. Why is a HiLo changed? Fumes were coming out of the machine, carbon dioxide is not dangerous, but put yourself in a garage with these fumes and you see headlines everyday of what happens when they are in a confined area without ventilation or poor ventilation and there are carbon dioxide fumes, they die. It's a slow death; it's a painless death. It's not something you are aware of. It has no smell, carbon monoxide.

Mr. Delaney said put yourself in a position of home owner who hires an electrician to come to your house and he does something wrong on his job. Are you responsible? Suppose you are that same home owner with all of your windows closed and there are fumes coming into the house because of this plumber or electrician and he asks you to open the window and give him some proper ventilation and you refuse. Who is responsible? That is what you are here to decide.

Mr. King whose job is safety said no question, the stevedore has the responsibility. The ship owner has responsibilities and the fact that the Federal Statute gives stevedores responsibilities doesn't say and doesn't mean to say that the ship doesn't have the same responsibilities if it had them before they have it now and this is what the statute says and it's just what his Honor will tell you the law is.

The very last point, the paragraph that defines scope of responsibility of a Federal Law says it is not the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulations or custom.

Of course, they are responsible for what they

do or, here, what they didn't do. They had a ventilating system and the testimony by Mr. Peritrie was that there was some sort of plate that covered the opening for it and they went up and they had to remove it; he went up there and he could not only feel it, but hear it and it was not working.

The only testimony was that the mate came into the hatch when the HiLo's were fuming. No mates here. There were no longshoremen here that said otherwise. There were no witnesses that said these HiLo's weren't fuming and that these men were not coughing and complaining. That is the evidence.Mr. Delaney would have you look at what is not here and what he would like to be here. Does a reasonably prudent ship owner who has the authority to stop work or see that a condition is corrected by the stevedore and who ignores that condition who does nothing about it, is that a proper action by a reasonable vessel owner? That is what you will have to decide and if you decide that is not reasonable that is the only question.

Mr. Delaney said that the law is an intricate and complicated thing and that even though he has to maintain the ship is not at all faulty he also has to maintain that Mr Marrale is at fault. If the ship is

not at fault that is the end of the case. You don't have to find anything else. It does not matter what Mr. Marrale did, that is it; but he said he has got to argue to you that Mr. Marrale was at fault. Why? Because common sense will tell you that the ship was at fault here; that is why he has to argue with you.

Mr. Bosco was brought in; I didn't bring him in. He confirmed that the HiLo's had to be changed. That the hatch was half closed; some fumes, excessive fumes in the hatch that ithad to be changed two or three times and the ship who has the authority and the power and the only one who canopen up that hatch all they had to do was move the cases off; kept it closed pressing a button to turn on a ventilating system would have cleared the air; that is all that it took and we wouldn't be here today. But they didn't do that. Nobody testified that they did that. The only testimony you heard was that the ventilation system was not operating.

I don't know why Mr. King came in because I don't think he added anything. We have the Federal Regulations. He was not there; he has no idea how the ship was constructed and what kind of ventilation system it had. He told you everybody's duties.

We have the testimony of Mr. Bederwitz who worked for the employer, who has a monetary exposure here when they learned of the accident. He takes down details, details of information from Mr. Marrale and after he takes it all down and he has it all down in his report, it's called a superintendent's report of accident, he prepares the typewritten report which has none of the information and this is what he sends to the United States Department of Labor of the Federal Government. How accurate is this report? Use your common sense and you will decide.

We have the hospital record in evidence. Mr. Marrale told you that he had a burning sensation in his chest. The hospital records say Mr. Marrale, patient, states that he was awakened this morning by tight burning pain in his chest.

A man is taken by ambulance to a hospital gasping for air, coughing having difficulty breathing and Mr. Delaney wants him to give a full detailed history to somebody who may be able to interpret that he was working in a hatch with HiLo's that had to be changed three or four times, had blowers in the hatch, the ventilating system was not working and he was overcome by the fumes and he had to come home and he wanted

him to tell of this while this man was gasping for breath.

When you go to the hospital and they have to find out what is wrong with you, you tell them what is bothering you and they look at you; they don't go into the history. No history of a heart condition. No prior history of any of this, only from the day that he was working with these fumes. Use your common sense. You see why the records read the way they do because that is what happened.

I can only ask at this time that you listen very carefully to his Honor's charge and that you bear in mind the importance of what you have to decide here. Use your common sense and base your verdict only on the testimony that was here, the evidence that was here, and the inferences that you can draw from what was here. Anything that is not here was not brought in. There was no evidence of carbon monoxide reading levels in the hatch that day, but Mr. King started to tell us that if they were at a level of .025 that is much higher than .0005. We don't have those records here. They were promised to you in Mr. Delaney's opening statement.

I will tell you just what I said at the outset of this case. Base your verdict solely on the testimony

of the evidence, his Honor's charge and you will reach a just verdict. Mr. Marrale was not at fault and that ship has an obligation.

Thank you.

THE COURT: Following my direction on the law, ladies and gentlemen, you decide the facts based on your practical knowledge of how people act and what you have heard here. Everybody here is equal, nobody is entitled to any sympathy. There was reference made, you will recall to insurance and insurance companies. Forget about that. It has nothing to do with this case. Insurance has nothing at all to do with this case and I don't want you to discuss it or thing about it. Is that clear to all of you? All of the jurors indicate that it is clear to them.

Now, the term burden of proof has been mentioned. I will define that to you and for you. When we say that a party has the burden of proof upon an issue we mean that with respect to that issue or proposition of fact that party must convince you that it is more likely than not that his intention is true. If you find as to any issue that the evidence is evenly balanced, then the one with the burden of proof must lose on the issue and you can consider all of theevidence in the

case on any issue no matter who introduced it. We do not expect certainty or near certainty in a civil case of this kind. All the law expects is that the probabilities as determined from the evidence be in favor of the party who has the burden of proof on the issue.

Second, when we say something has caused something else, we mean that it was a substantial factor and that without it the occurrence would not have taken place. It need not be the only cause.

By negligence we mean the absence of the kind of care that a reasonably prudent person or institution would take under the circumstances. Such a reasonably prudent person or institution is expected to take reasonable care to foresee the consequences of its act or failure to act to avoid accidents. The mere fact that the plaintiff was, if he was harmed, does not make the ship owner liable to him. You may not find for the plaintiff unless you find the plaintiff's harm was caused by the ship owner's negligence. It was the duty of the defendant ship owner at the time and place of the incident described here to use ordinary care under the circumstances, to furnish the plaintiff with a reasonably safe place in which to work aboard the ship and to use ordinary care under the circumstances

to maintain and keep the place of work in a reasonably safe condition. This duty to use ordinary care under the circumstances which is owned by the ship owner to the longshoreman while aboard the vessel exists independently as and separate from any similar duty owed to the longshoremen by others including the stevedore company as employer.

Nevertheless, of course, the ship owner can consider what a reasonable stevedoring company will do to protect its own personnel. Thus, the ship owner has the duty of exercising reasonable care under the circumstances of this case. There was no duty on the part of the ship owner to test the hold for fumes. The primary duty to furnish a reasonably safe place to work with respect to dangers created by the operation of a HiLo machine is that of the stevedoring contractor who employed the plaintiff. If you find, however, that the ship's ventilation system was not working because of the negligence of the defendant ship owner and that this caused the difficulty to the plaintiff, you could find the defendant liable. If the defendant knew of the dangers, if any, in the hold, and was negligent in not taking corrective action, you can find the defendant liable. If you find that the condition which caused the

plaintiff's alleged injuries should reasonably have been corrected by the stevedore alone, then you must find for the defendant ship owner.

A ship owner is under no duty to warn a stevedoring company or its longshoremen, employees, of any dangers or effects which are open or obvious or known to the stevedoring company or its employees or for conditions which could be observed by the longshoremen employees in the exercise of reasonable care unless the ship owner could anticipate the harm despite such knowledge or obviousness. The ship owner has no duty to supervise any loading or discharging work performed by the stevedoring company or their employees including this plaintiff.

The burden of proof is upon the plaintiff and if the plaintiff fails to sustain his burden of proof then you must find for the defendant. If you find that the defendant was negligent you must then determine whether or not the plaintiff himself failed to exercise that degree of care that a reasonably prudent person would have used under the same circumstances. If you find that he did not, then the claimant was guilty of contributory negligence.

In considering the defendant's claim that the

1 plaintiff was guilty of contributory negligence, you
2 should bear in mind that the plaintiff is not charge-
3 able with any negligent conduct of his employer, the
4 stevedore company, or any of his fellow employees.
5 The plaintiff is only chargeable with his own conduct.
6 So in connection with the defendant's claim of contribu-
7 tory negligence, you will consider only what the
8 plaintiff himself did or failed to do at the time and
9 place in question as shown by a preponderance of the
10 evidence in the case. The defendant has the burden of
11 proving that the plaintiff was himself guilty of
12 negligence and that this negligence caused or contributed
13 to the incident. If you find the plaintiff contributorily
14 negligent, you must then determine the proportion his
15 negligence played in causing the accident. For example,
16 you might find that the accident was one hundred percent
17 due to plaintiff's negligence or 25 percent due to
18 his negligence and 75% to the ship owner's negligence
19 and so on.
20 I have prepared for you what is marked Exhibit
21 5, a kind of questionnaire. I will read it to you.
22 What you will do is fill it out. It must be unanimously
23 agreed upon by all of the jury. One, was the defendant
24 negligent in any way that caused harm to Mr. Marrale?
25

If the answer to that is no, that is the end of it. Just answer it no and bring it in. If the answer to question number one is yes, then you will have to answer what percentage of the total negligence causing the harm is attributable to the defendant ship owner. Three, was Mr. Marrale negligent in any way that caused harm to himself? If the answer to question number three is yes, then what percentage of the total negligence causing the accident is attributed to Mr. Marrale. I think that will help you.

You should consider fully scrutinize all of the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether a witness is worthy of belief; consider each witness' intelligence, his motive, his state of mind and his demeanor and manner while on the witness stand. Consider the relationship any witness may bear to either side in the case; the manner in which each witness might be affected by the verdict and the extent, if at all, that the witness has been corroborated or contradicted by other evidence in the case.

You should consider fully, evaluate, the expert's testimony and the expert witness may give his opinion and its value depends upon his qualifications,

experience and interest in the facts upon which the opinion is based. You may disregard the opinion, if you find that the opinion is based upon facts which were not established by a fair preponderance of the credible evidence. If any witness made a false statement, you can ignore his testimony completely, but remember a person may be mistaken as to one part and maybe accurate as to another part and you will have to choose.

If you wish any of the testimony read just send a note in and we will try to find it, but if all in that machined and it's hard to get to it, it has not been typed up, so if it is not really needed please don't ask for it.

If you want any of the exhibits that were marked in evidence, all you have to do is send a note asking for whatever exhibit that is in evidence that you want.

If you think I can be more helpful to you on the law just send in a note and we will try to be helpful. Don't discuss this case with anyone outside the jury room.

Each of you is entitled to your own opinion. You should exchange views politely with each other; that is the very purpose of your deliberations and your consideration of the case.

Listen carefully to each other. You should reach a decision only after considering your fellow jurors views. You should not hesitate to change your opinion, but your decision must be your own. Don't change views because you are outvoted.

The verdict must be unanimous as to each one of these questions.

Is there any objection to excusing the alternates?

MR. DELANEY: No, your Honor.

MR. KORSON: No.

THE COURT: I will hold them in the building in case there should be a problem.

All right, the two alternates are excused. Please don't discuss the case with each other and remain in the building until four o'clock. At four o'clock you may leave and you will not be needed any further.

(Whereupon, two alternates left the courtroom.)

THE COURT: Swear the marshals please.

(Whereupon, the marshals were sworn by the clerk of the Court.)

MR. KORSON: Your Honor, before the jury retires, shall we renew our previous statement?

THE COURT: Do you want to come to side bar?

(Whereupon, the following was held out of the hearing

of the jury.)

MR. KORSON: Your Honor, I take exception to the phrase primary duty to furnish reasonably safe place to work with respect to dangers created by HiLo machine, that of stevedoring contract who employed the plaintiff. I believe the testimony by Mr. King was that the duty is on both their parts. You cannot really call one primary over the other and their duty to see that the condition is corrected so the atmosphere is safe for the men.

MR. DELANEY: I think you have to use the word primary.

MR. KORSON: That is testimony, that is not a matter of law which your Honor should change.

THE COURT: Based on the evidence in the case, I think that is accurate.

MR. KORSON: I take exception.

That is it.

THE COURT: Anything else?

MR. DELANEY: On the same page, your Honor, in view of Mr. King's testimony in the safety regulations 1504.93, iii, I think that where the ship's ventilation system is not working or there isn't one if the stevedore's responsibility to provide ventilation. I would object to the paragraph on page three which says if

you find that the ship's ventilation system was not working because of the negligence of the defendant and this caused the difficulty, you can find that the defendant is liable.

THE COURT: Well, the evidence we have is that there was a ship ventilating system, it was not working and your own expert testified that when there is such a system it should be turned on.

MR. DELANEY: Right, but the rule says that where either the natural ventilation system orthe ship's ventilation system is not adequate to keep the carbon monoxide concentration down within allowable limits, the employer should furnish supplementary means for ventilation.

MR. KORSON: Which they did.

THE COURT: You had an opportunity to argue that. I think the evidence is right.

MR. DELANEY: At the end of the plaintiff's case --

THE COURT: Research your motions.

All right, take the jury out.

(Jury left the courtroom.)

THE COURT: Gentlemen, I will now hear you on motions which will be deemed to have been made at the

end of the plaintiff's case and at the end of the whole case.

MR. DELANEY: The defendant would move first of all to dismiss the complaint on the ground that the plaintiff failed to establish a prima facie case of negligence on the part of this defendant and, in addition, for a directed verdict in the defendant's favor on both plaintiff's case and on all of the evidence adduced in this case on two grounds, first, that the conditions caused here created here, conditions complained of which is excessive fumes in the hatch, conceivably what created and caused by the stevedoring equipment and that the claim of negligence against the defendant was, I gather, two fold: First, that there were excessive fumes in the hatch and that apparently the defendant ship owner should have stopped the work because of excessive fumes.

Secondly, the ship owner failed to provide adequate ventilation because its own ventilation system was not either working or adequate or both.

Now, as to the fumes claimed, your Honor, I would submit there is no testimony here sufficient on the approximate cause as to whether the fumes there caused anything to this plaintiff, anything wrong. He said

that it caused him to cough that day. He got sick and went to the hospital. The hospital records indicate he had a probable heart attack which they ruled out. The other medical records, L.I.A. indicate that the man had previous chest pains also similar type of chest pains; that previous heart attacks were ruled out and that if these fumes caused any injury to this plaintiff, there is no proof here sufficient to go to the jury that this defendant is liable for anything that resulted from the fumes that day.

As to the ventilation system, the longshoremen's regulations are in evidence. Mr. King testified that the regulations themselves say that the responsibility is on the employer,the employer was Pittston Stevedoring and not the ship owner and that the section I just referred to 1504.93, iii, say that where there is natural ventilation or the ship's ventilation is not adequate to handle the carbon monoxide level in the hatch, the stevedore is to provide portable means of ventilation until the concentration is brought within personal limits until work resumes. If anything was wrong here the stevedore supposedly would have stopped work. They did not stop the work.

I submit that is not sufficient evidence here of

any violation of any rule or regulation or custom or practice sufficient to submit the issue of negligence to the jury as against this defendant.

THE COURT: Motion denied.

May I have the exhibits so I can send them into the jury.

MR. KORSON: Your Honor, I have a motion at the close of the entire case. The only evidence in this case and the only inferences from the testimony in this case is that there were changing of HiLo's at least one time; that there were complaints made by the men in the hatch that the men were coughing in the hatch and that the plaintiff was taken to the hospital in the early hours of the next morning as a result of breathing difficulties from that; that he had no history of such problems before and he had no history of heart trouble and according to the hospital records he had no hypertension.

I would submit, your Honor, that it is therefore unquestionable by the evidence that there was a dangerous condition in the hatch; that the vessel knew about it because there was a mate in the hatch; there was testimony or inference that there was a mate in the hatch and that the vessel did nothing, absolutely nothing,

about this condition. Any obligation on the part of the stevedore which may or may not have been violated in no way detracts from the liability of the vessel.

THE COURT: Motion denied.

(Whereupon, Court recessed awaiting the verdict of the jury.)

(Whereupon, at 2:20 P.M. the jury returned to the courtroom.)

THE COURT: Jury note marked Court Exhibit number six.

Bring the jury in.

(Jury entered the courtroom.)

THE COURT CLERK: Please rise, Madam Forelady.

Your answer to number one, was the defendant negligent in any way that caused harm to the plaintiff, how do you answer that?

FORELADY: Yes.

THE COURT CLERK: Your answer to number two, what percentage of the total negligence causing the harm is attributable to the defendant?

FORELADY: 50 percent.

THE COURT CLERK: Was Mr. Marrale negligent in any way that caused harm to himself?

FORELADY: No.

THE COURT: Poll the jury.

THE COURT CLERK: Madam Forelady, members of the jury, you have heard the verdict as the Court has received it.

Yes or no, is that your verdict?

Juror Number One: ?

JUROR NUMBER ONE: Yes.

THE COURT CLERK: Is that your verdict, Juror Number two?

JUROR NUMBER TWO: Yes.

THE COURT CLERK: Is that your verdict, Juror Number three?

JUROR NUMBER THREE: Yes.

THE COURT CLERK: Is that your verdict, Juror Number four?

JUROR NUMBERFOUR: Yes.

THE COURT CLERK: Is that your verdict, Juror Number five?

JUROR NUMBER FIVE: Yes.

THE COURT CLERK: Is that your verdict, Juror Number six?

JUROR NUMBER SIX: Yes.

THE COURT CLERK: So say you all.

THE COURT: Gentlemen, is there any reason why

we should not discharge the jury for this portion of the trial holding them available for the portion to begin tomorrow?

MR. KORSON: Your Honor, I don't know if we should discuss it in front of the jury. I have a question about the interpretation of the verdict.

THE COURT: All right, then we won't do anything for the moment. Just wait in the jury room for a moment.

(Jury left the courtroom.)

MR. KORSON: Your Honor, I don't think the jury's verdict as stated is a proper one because the only issue it had to decide was the negligence of the vessel and if the plaintiff is not negligent then it's one hundred percent on the part of the vessel.

THE COURT: What they are saying is that it was partly due to the stevedore and partly to the vessel.

MR. KORSON: I appreciate that is what they are saying and I agree with that interpretation of it, but I don't think it's possible for this jury to reach such a finding. The issue is not what percentage this vessel is liable for. The law states if the stevedore is liable and the vessel is liable the vessel's liability is not diminished by the amount of the stevedore.

THE COURT: What they are saying is the vessel is

liable and so is the stevedore and they would have 50% liability. It's a perfectly proper verdict.

MR. KORSON: Once they've tried damages and they reach a figure does it then get cut in half?

THE COURT: That we will talk to them about later. The only question I will put to them is how much damages are attributable to this incident, that is all I will tell them not to reduce it and we will figure that out.

MR. DELANEY: I think you are right. They felt the stevedore was 50% responsible; that seems to be the only issue left, how much?

THE COURT: The question of contribution we can take briefs on later.

MR. DELANEY: I have nothing else for this jury today.

THE COURT: Let the jury go and have them back here tomorrow morning at 10 o'clock.

MR. KORSON: I will have my doctor in the morning. We have the entire hospital records which have been accepted.

THE COURT: It will take very little time. Give me your request to charge. I will have to start another case tomorrow morning.

Bring the jury in.

(The jury entered the courtroom.)

THE COURT: Ladies, we have some other cases scheduled for tomorrow and the doctors cannot be here this afternoon so if you can come here 10:30 on Friday we will have the doctor in and we can take care of the second part of this case which is to determine how much, if any, damages resulted to the plaintiff as a result of this incident. Do you all understand?

(Jury left the courtroom.)

* * * * * * * *

THE CLERK: Civil cause on trial Marrale versus Cia Mar De Nav.

MR. KORSON: Before I call the witness, I've received the hospital record, the admission, and I offer it in evidence.

THE COURT: Mark it just the record.

THE CLERK: Hospital record marked Plaintiff's Exhibit 1 in evidence.

MR. KORSON: I'm removing the bill then your Honor, for the time being.

Your Honor, at this time I call Dr. William Dunaway to the stand.

W I L L I A M D U N A W A Y , M . D . , having been called as a witness was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MR. KORSON:

Q Dr. Dunaway, are you a physician duly licensed to practice medicine in the State of New York?

A I am.

Q Will you please tell his Honor and the jurors what your medical background and training and qualifications are.

A I graduated in nineteen hundred and thirty from

medical school, Louisville, Kentucky, studied in New York as a post graduate for five years at different hospitals. I have been practicing in New York City doing surgery since 1935.

Q Doctor, do you have offices at which you maintain your practice in Brooklyn?

A I do.

Q What is your address?

A 930 Third Avenue.

Q How long have you been at that location?

A Since 1949.

Q Now, did there come a time in June 1973 when Mr. Antonio Marrale came to your office?

A Yes, I saw him.

Q Did your office obtain a history from him at that time?

A Yes, I did.

Q What history was obtained?

A While working in the hatch he was overcome by fumes; high-low machines were used all day in the hatch. The next morning he was taken by ambulance to the Long Island College Hospital, admitted and was discharged on June 8th. I made a note: "Claimant was complaining of pains in chest, dizziness and felt nauseated, reason for admitting him for

admission to the hospital.

Q Did you examine Mr. Marrale?

A I saw him on June 19th and I examined him on that day in my office.

Q When was the first day that you saw Mr. Marrale?

A On June 13.

Q Were any x-rays taken?

A We x-rayed his chest that day.

Q And what were the results of that examination?

A Negative.

Q What did the rest of your examination consist of?

A It consisted of examining his chest, the lungs.

Q Now, based upon your examination and his complaints, did you make certain findings?

A I did.

Q What were those findings?

A I made a note that he was suffering from an irritation from the upper respiratory tract and from the lower respiratory tract, which is his windpipe, possibly gas fume irritation.

Q And did you institute a course of treatment for Mr. Marrale?

A I treated him symptomatically, that is, for what he was complaining of.

Q What did your treatment consist of?

A We gave him medication for discomfort and when he had trouble breating, medication for that, and we gave him sedatives and advised him to rest at home.

Q Now, the medication that you gave him was that oral or injections or what?

A I gave it by mouth.

Q And did Mr. Marrale continue to come to your office for treatment?

A He did.

Q How often?

A I saw him on seven different occasions, the last time was on June 27th.

Q Up until that time did your treatment consist of what you have just described?

A Yes.

Q Did his complaints persist?

A When I last saw him he was still complaining of the same thing.

Q And when you last saw him had you discharged him?

A No, I didn't discharge him.

Q Did you expect him to return?

A Well, the patient went to Italy to see an ill relative on June 28th.

Q Did he ever return to your office?

A No, I haven't seen him since.

Q Now, we have here, Doctor, the records from Long Island College Hospital, and I would ask your assistance in going over them and in interpreting them.

Now, when Mr. Marrale was brought to the hospital, what was initially suspected?

A His admitting diagnosis was coronary insufficiency. That means the blood vessel that feeds the heart muscle was not functioning normally.

Q Now, when Mr. Marrale was discharged, did the record show whether or not the suspected coronary insufficiency was confirmed?

A It was not, but there is a notation here, the following diagnosis is chest pain and the cause unknown.

Q In going over the records, can you tell us what Mr. Marrale complaints were in the hospital and what they found.

A He was admitted and diagnosed, pain in the chest, as I said, and the patient at that time stated that he

was having trouble breathing; pain in the chest, burning pain in the chest, and they made a notation here, heavy sweat.

Q On the same page that you are on -- the next page, I'm sorry, is there any indication here of any further problems or symptoms or complaints?

A Yes, there is a notation here that he is coughing up black sputum.

Q What significance, if any, do you attach to that comment Doctor.

A Well, black sputum would probably -- could be from an old bleeding situation in his lungs and blood is passed in a tissue-like that; it remains in the body. It has a tendency to turn black, dark. I don't know where the blood came from. That would be my impression, old loss of blood of the respiratory tract when he coughed it up.

Q Now, bearing in mind that Mr. Marrale the previous day to his admission, he was admitted in the early morning hours. He had been working as a longshoreman in a hatch from 8:00 in the morning 'til 12:00 noon, and then from 1:00 o'clock in the afternoon until 7:00 o'clock in the evening; that he was working down in one of the lower decks, and that the hatch above him was not entirely open, half of it was

closed and half was opened; a high-low machine was operated in the hatch the entire day and the fumes from the machine were such that it was changed one, two, or three different times; one or more blowers on sleeves had been lowered into the hatch to draw the fresh air from out above and below down into the hatch, and the ship's ventilating system was not working at all. Mr. Marrale was exposed to this all day. He coughed during the day and he felt week and dizzy; he went home at 7:00 o'clock that evening, had some broth and went to bed; he was awakened in the early morning hours gasping for air, having difficulty breating with a tight burning sensation in his throat and upper chest in the middle; an ambulance was sent for and he was rushed to Long Island College Hospital where he was admitted -- and you have the record of the admission before you -- he remained there for some seven or eight days; electrocardiograms were taken and they were all negative.

Do you have an opinion based upon reasonable medical certainty whether or not the incident that I have described to you, working in the hatch and being exposed to those fumes throughout the day was a competent producing cause of the symptoms that he complained of, and that he was admitted to the hospital for.

A Well, in my opinion from the history I have from

you, and from my examination, and the fact that they admitted him to the hospital at 3:00 o'clock in the morning -- they usually don't admit patients at 3:00 o'clock in the morning unless they think he's very sick.

Q He was taken to the hospital about 2:30, he wasn't admitted until 5:00 o'clock; he was first taken to the emergency room.

A He was kept in the hospital. It is my opinion he had suffered some damage to his respiratory tract by being subject all day long to the fumes.

Q What sort of treatment did he receive while he was in the hospital.

A Well, he was given a sedative; he was also given intravenous glucose solution, 500 cc.

Q With that, Doctor, with that intravenous glucose solution, would you assume that he could or could not leave his bed?

A I beg your pardon?

Q When he had the intravenous, would he be confined to bed?

A We give it in bed.

Q Please continue with the treatment, Doctor.

A And he was given sedativas, checked in the

hospital for seven or eight days; they did x-rays, electrocardiograms.

Q What was the result of the electrocardiograms?

A Negative, no heart trouble. He apparently improved, discharged seven, eight days from the time he was admitted.

Q Now, Doctor, there had been testimony subsequent to this final visit to you when Mr. Marrale went to Italy, he saw a doctor there --

MR. DELANEY: I object to any testimony about any medical treatment that he received in Italy. This could have been obtained. I'll object to any testimony about medical procedures in that vane.

THE COURT: We have testimony from the plaintiff.

You may continue.

DIRECT EXAMINATION

CONTINUING BY MR. KORSON:

Q Assume, Doctor, there has been testimony that Mr. Marrale subsequent to his final visit to you went to Italy, saw a physician there, had his chest x-rayed, received injections and medications and he continued to suffer from the same or similar symptoms.

Do you have an opinion based on reasonable medical certainty whether those symptoms and that treatment was related to the conditions that you have described and found.

A In my opinion it was a continuation of the same episode I saw in my office. I think probably he was suffering from irritation of the respiratory tract in Italy; that would be my opinion.

Q And assume further that with those symptoms and that treatment Mr. Marrale continued to cough occasionally and felt a weakness, would he have been able to work during that period?

MR. DELANEY: I object to this. I don't remember this part of the testimony was in there about his time in Italy.

I object to this doctor testifying as to whether he could have worked during this period.

THE COURT: No; I'll permit it. You may answer.

Q (continuing) Doctor, assuming those symptoms in Italy, could this man with that condition and those symptoms work as a longshoreman climbing up and down ladders, off and on cargo, lifting different types of weights of cargo,

and working in hatches where high-lows would be used from time-to-time? Could he have done that at that time?

A Well, all I can say to that, the time I saw the patient which was from June the 13th until June 27th, he was unable to work as a longshoreman. I can't testify to what happened in Italy.

Q Well, Doctor, if I ask you to assume that his symptoms --

MR. DELANEY: I'll object to that; the doctor has answered the question. He said he can't testify.

THE COURT: I'll allow it.

DIRECT EXAMINATION

CONTINUING BY MR. KORSON:

Q Doctor, if I asked you to assume that the symptoms that you observed and the condition that he complained of in Italy, could he have worked at that time.

A It would be my impression that he could not.

MR. KORSON: Your Honor, I don't know if your Honor would permit me to ask this because I'm taking this witness out of order. It's my intention to recall the plaintiff.

I would like to ask this doctor about the value

of the physician in Italy.

THE COURT: I'll take from this witness the reasonable value of this service.

DIRECT EXAMINATION

CONTINUING BY MR. KORSON:

Q Dr. Dunaway, assume that Mr. Marrale had seen this doctor in Italy six times in his office, and that the doctor had made 10 house calls; that x-rays were taken of Mr. Marrale's chest on one occasion, and that the doctor had given Mr. Marrale injections; can you tell us his reasonable value of such a service?

A How many visits?

Q Six office and 10 house calls.

THE COURT: Rather than do it that way, give him the charge and ask him if that's a reasonable service.

MR. KORSON: It's in lire.

I believe, it's $100.

With the total charge, would it be $100?

A For 16 visits, I would say very reasonable.

THE COURT: Give him the hospital bill and all the other things. Let's get that all out of the way.

What were your charges, doctor.

THE WITNESS: My charge is $76.

THE COURT: Was that reasonable?

THE WITNESS: Yes, I think it was.

BY MR. KORSON:

Q That was for several visits?

A Seven visits.

Q I show you this itemized bill from Long Island College Hospital, and I ask you if the amount on that bill is reasonable for the services described.

A Well, that's in keeping at the rate of $97 a day for a bed.

Q And what is the total?

A $1125.

Q That includes x-rays and whatever was given?

A Yes.

MR. KORSON: I offer it into evidence.

MR. DELANEY: I object to it.

Your Honor, I object to it on the grounds of reasonableness, that the period while this gentleman was in Long Island College Hospital was for an unrelated incident.

THE COURT: You understand ladies and gentlemen that if you're not satisfied, as I'll explain to you

later, that these damages resulted from this incident, that he's not entitled to collect; is that clear? So the fact that I'm letting this bill in doesn't mean that I'm saying he's entitled to it. I'm just letting you have the evidence so you could make your decision.

Objection overruled.

THE CLERK: Plaintiff's two in evidence.

THE COURT: Anything else?

MR. KORSON: Yes, your Honor, the clinic records.

Mr. Delaney has asked me so I'll ask the doctor:

There is no indication on that bill that it was paid, is there doctor?

A No, I don't see where it's paid.

Q From what you can tell, it's an outstanding bill?

A It looks to be.

Q Now, we have in evidence -- Mr. Delaney has put into evidence the ILA Clinic records. After Mr. Marrale came back from Italy, he had certain complaints which persisted and he went periodically to the ILA Clinic and I would ask you to go over these with me, if you would, doctor --

incidentally, doctor, has your bill of $77 been paid?

A No.

Q I'll ask you to restrict your testimony to the chest and coughing and symptoms along those lines.

When is the first such complaint that you note on the record.

A On June 6th.

Q Of what year?

A 1972.

Q And that predates this particular incident. What was the occasion of Mr. Marrale's visit to the clinic?

A There are notations here, occasional spells of palpitation and swelling past year.

Q Are those complaints and symptoms in your mind with reasonable medical certainty related to the complaints we heard described from this incident?

A Well, this is before he had this inhalation of these fumes. At that time he had spells of palpitation, that is just -- many people have it -- and sweating.

Q What are the possible causes of that, doctor?

A I can't testify as to why he had them, but other patients I've treated, it's a heritage in the family where you get palpitation as a rule and sweating would come

from heart beating fast.

Q Do you have to get that from exposure to fumes?

A No.

Q The next notation is from July 3, 1972, which is also before the incident we are concerned with; and what kind of complaints did he have then?

A He was in on July 3rd and they made notation noting that he had similar episodes of chest pain sensation, shortness of breath -- tightness of breath and tightness about the neck with sweating.

Q And would that be related to the previous incident described?

A No, that's still in '72.

Q Would it be related to the previous incident in '72?

A No, that's a year before.

Q Now going on to the next reference to the chest, it would be at the time of our incident. There is a reference, is there not, to Mr. Marrale having been rushed to Long Island College Hospital -- it looks like June 1, 1973.

A Whatever it is, it's in '73. Now, had chest pain and rushed to Long Island College Hospital, admitted -- if you can read that, you might read it for me, I can't read it.

Q Admitted for studies.

A I imagine that's what that means, yes.

Q And his complaint, can you tell us what that is -- at any rate, that is the first entry for this occurrence and there were then how many incidents of chest-related incidents prior to that.

A Well, he has palpitations -- that's the heart, that would be in the chest, sweating could be from that.

Q That's one incident?

A And noted that he had similar episodes of chest pain and sensation of touch.

Q So the only entries prior to Long Island College entry is two in number?

A That's what they have here.

Q Subsequent to the Long Island College Hospital admission, let's see if we can trace how many complaints there were of coughing and chest pain.

A Complained of head, chest and cough.

Q What date is that?

A That date is on January 23rd '74.

Q That's one.

A July 2nd, 1974, complaint of chest -- that's a description of the doctor --

Q And when is that?

A That's July 6th --

Q Is that February?

A 2-6-74.

Q That's two.

What is the next one.

A The next one is March '74, I suppose it is.

Q And what was that concerning.

A Complaining of chest oppression on exercise. The rest is history.

Q That's three. When was the next one.

A I think that must be April -- April 24th of '74.

Q What were the complaints at that time?

A Complaint of chest oppression on exertion.

This is May.

Q What were the complaints?

A Substernum chest pains.

Q How long did it last?

A Lasted all day.

Q And what was the impression?

A None; no heart pain.

Q What are the words.

A None. Cardiac pain.

Q Five.

A May 27th '74.

Q What was the complaint or the test at that point.

A He was in for a GI Series and chest.

Q And what does it say here, Doctor?

A Still has tightness in chest with dizziness, shortness of breath.

Q Now, the next one -- I don't know if it's legible. Can you make it out?

A Five fourteen.

Q How about this one, March 31st of '75.

A Coughing three days.

Q That's number seven.

A Chest pain.

Q And the next one, Doctor; what is the date.

A April 3rd.

Q What was the complaint?

A Cough present.

Q Cough persistent; that's number eight.

Next one is not related, different part of the body; and the next one is a different part of the body; and that's a different part of the body.

What is the next date.

A October 27th, '75.

Q What are the complaints?

A Cough.

Q Nine.

A Next visit cough.

Q What date is that, December of '75, that's 10. Next one.

A February 6th, '76.

Q What were the complaints?

A Three days increased cough.

Q That's number 11.

A February 17th.

Q Complaint?

A Still complaining of cough, production of yellow sputum and chest pains and fever.

Q Next one?

A Chest complaint.

Q Twelve; and the next one?

A For the cough?

Q That's the 13th?

A Medication.

Q Next one?

A And on March 12 '76, complaining of pain in

lungs.

Q That's 13; and the next one?

A Chest x-ray, I guess it is.

Q What date is that?

A That was on April '76.

Q That's 15?

A Complained of coughing.

Q That's 16.

MR. DELANEY: What was that date?

MR. KORSON: April 1976.

Q Next one?

A Nothing there.

On December 6th '76, sore throat, hoarseness.

Q That's 17.

A And coughing. That's about all.

Q You are able to make out at least 17 complaints of coughing, difficulty in breathing or difficulty in the chest region since this incident with the number of complaints and the type of symptoms you found in a normal individual?

A I don't understand your question.

Q The number of complaints made at the ILA Clinic and the symptoms described and tested, were those symptoms expected to be found, that number, that frequency in a healthy

normal individual?

A No, I don't think so.

Q Do you have an opinion based upon reasonable medical certainty whether they are related to the conditions that you found and you have described?

A Well, I'd answer you like this: In my opinion, they must be related. However, it would be awfully nice if one could find out the two years previous to this, going back further in '72.

Q Assume, Doctor, that there are no records available from two years previous because there are no complaints prior to this, can you then answer the question?

A Then, I would think that they are related.

MR. KORSON: I have no further -- I have one other question.

BY MR. KORSON:

Q Do you have an opinion whether or not such symptoms or conditions are permanent in nature in view of the fact that they have persisted since May 31st, 1973?

A In my opinion, it would be a permanent situation here.

Q And is it the type that you would expect to improve or get worse, deteriorate or remain approximately the

same.

A Well, I would think it would improve by now, but I think he is still complaining about the same thing he had before.

Q If you bear in mind that he still works as a coalman and is still exposed from time-to-time to fumes and ashes from high-lows, would this have an effect upon his condition?

A You mean working with fumes?

Q Yes.

A I would think so.

Q What type of effect would it have?

A I think it would aggrevate his present condition.

MR. KORSON: I have no further questions.

CROSS-EXAMINATION

BY MR. DELANEY:

Q Could we go back to the first day that you saw Mr. Marrale. Who took the history from him?

A My medical assistant.

Q Who is your medical assistant?

A At that time it was Ms. Westberg, I believe.

Q Did Ms. Westberg speak Italian?

A No.

Q Do you speak Italian?

A No.

Q Do you understand it?

A No.

Q Do you know who gave that history to your assistant?

A No. I have no idea where she got the history.

Q If I told you Mr. Marrale doesn't speak English very well, would this change -- I'll withdraw that question.

If I told you Mr. Marrale doesn't speak English, he had to testify here through an interpreter, would you give us any kind of an idea where you got that history from?

A No, I could not.

Q Any indication there who sent Mr. Marrale to you?

A Yes. I have a notation that Mr. Fortunato referred him to me.

Q Mr. Fortunato sent a history along?

A That I don't have; I don't recall.

(Continued next page.)

ollows

BY MR. DELANEY:

Q Your history, is that --

A This is Ms. Westberg's writing, she's not acquainted with Italian.

Q Dr. Dunaway, did you actually see the patient yourself on that day?

A Yes, I'd seen him on the 13th of June, the first time.

Q What did your examination consist of?

A Examined his chest, heart, lungs, blood pressure.

Q Did you send him to a Dr. Aretha?

A That's the x-ray doctor and he was referred there for x-rays.

Q That was the same day; is that right?

A Yes; same day I saw him.

Q Did you get a report from Dr. Aretha the same day?

A Yes I did, not the same day but I have the report from him.

Q Did you get a report on the telephone as to what he found?

A It's negative.

Q Negative means he couldn't find anything wrong?

A It means that nothing shows on x-ray.

Q And Dr. Aretha said his lungs were clear?

A That's correct.

Q You say you listened to his breathing?

A I did.

Q And you concluded there was some irritation; is that right?

A From the history and of the accident and of the complaint the patient presented here on taking the history, I assumed that he was suffering from an irritation of the upper respiratory tract.

Q Could you tell that he was suffering from irritation by listening to his breathing?

A I didn't say that I did --

Q I didn't say it either, but I'm asking you, could you.

A Could you hear if he had irritation?

Q Right.

A I don't think so. You could hear noises if he had some physical obstruction to the passages, like changes of breathing sound.

A An irritation could be like a sore throat,

1
2
3 couldn't it be a sore throat?
4 A Yes, that's similar to it.
5 Q In other words, the lining of your throat and
6 your lungs have a mucous membrane lining, similar type lining
7 and if it's red or sore it is irritated; is that correct?
8 A That's right.
9 Q Unless you physically look at it, can you tell
10 it's physicall irritated?
11 A No, my impression here is not positive, is not
12 objective. I'm just assuming the history, from the story
13 from his hospitalization, from his complaints, from being
14 subjective, this concentration of fumes, I must make the
15 impression that I believe he must have irritation of the
16 respiratory tract which would account for these symptoms.
17 Q In other words, if this man came to you and
18 he told you that this is what happened to him, that opinion
19 that you wrote down, irritation of the respiratory system was
20 based here entirely on the history he gave you; is that cor-
21 rect?
22 A Yes, partly; yes.
23 Q You tested him and you examined him, and you
24 couldn't find anything.
25 A No, I would say that he had been admitted to the

hospital so I would assume that some other doctor had agreed that he had some trouble with the chest also.

Q You viewed the Long Island College Hospital record?

A I just looked at it, didn't really examine it.

Q How long a period of time before today did you look at the record? How much time did you have?

A Well, about as much as I have on the stand, maybe less time.

Q Did you find any mention in that hospital record at all any place about Mr. Marrale breathingin any fumes?

A I don't recall.

Q Now, those doctors in the Long Island College Hospital, did they treat him for inhalation of fumes, and irritation of his respiratory system?

A I believe one place had mentioned that they gave him sedatives.

Q They gave him sedatives when he first came in there; didn't they?

A I don't think so.

Q Will you look at the record where it shows when he was first admitted into the hospital itself, I think it's like 9:30 in the morning, and they tell the kind of medication

they started him off on?

MR. KORSON: I thought you said he was admitted at 5:00.

MR. DELANEY: I didn't say he was admitted at 5:00.

Q Have you found the page where they first start treating him?

A I think I recall that he was given a sedative, an intravenous glucose.

Q And he was put on a cardiac monitor?

A I don't see that but I'll agree with that.

Q Isn't that treatment consistent with someone they think had a heart attack?

A Yes, that would be one of the treatments for a heart attack.

Q When someone is admitted into the hospital with a possible coronary or cardiac condition, don't they always give them a sedative os some sort?

A Oh yes, you give them medication.

Q That's to relieve at least the tension and nothing else?

A Yes

Q Because someone in that condition is probably

frightened; isn't that so?

A Yes.

Q And intravenous is a normal procedure given in a cardiac condition?

A No, we don't always give sugar in the veins, but that's good treatment for anyone that's suffering from what this man was suffering from until you make up your mind as to what you are going to treat him for.

Q There is also treatment for shock?

A He was sweating.

Q The treatment given to him in the hospital was consistent with what they thought was wrong with him and that was a cardiac condition; right?

A Well, he was apparently in a moderate degree of shock, which is evident by a cold sweat, pain in the chest, weakness.

Q Now, let's go back to my original question: Is there anything in that record that you could find which says that those doctors treated him for an irritation of his respiratory system?

A No.

Q What was his condition when they discharged him?

A I have no idea.

Q Does the record state?

A I could look it up.

Q Would you please?

A I'll quote them if I could find his discharge record. I haven't been able to find the discharge note, but he should have a discharge note when --

THE COURT: Show the doctor what you want.

MR. DELANEY: I think the second page is a discharge summary.

Q Does that state what his condition was on discharge?

A He's complaining of chest pain; idiology unknown.

Q That's the diagnosis; right?

A That's the discharge diagnosis.

Q They couldn't figure out what caused his pain; is that right?

A No.

Q So they treated him for this chest pain.

Doctor, they took blood tests while he was in the hospital?

A Yes, I assume so.

Q And did these blood tests -- if you look on the back, the blood tests are there -- list the cholesterol level?

A Yes.

Q I think it's 210.

A Cholesterol level is 299 at one place -- 210 another time.

Q What does that mean, Doctor?

A That's the content of fat in the blood.

Q Is that normal?

A I would rather have the 210 than 299, both could be normal.

Q 299 might be a little high?

A Could be on certain types of people.

Q Now Mr. Marrale, do you have any indication how tall he was?

A I would judge him five six.

Q And how much he weighed?

A 180.

Q If I told you he weighs 187 that would be consistent?

A I would say I'm a good guesser.

Q Would you say he's overweight?

A Five six, I'd say he's overweight.

Q The first complaint we see in the ILA Clinic records on June 6, 1972, is when he went in with spells of

palpitation which you said is rapid heart beat and sweating; sweating is rapid -- sweating is consistent with the rapid heart beat.

A Well, I think in this case.

Q One could cause the other?

A I think in this case the man was in a type of shock.

Q But in any event if you're not breathing, not getting enough oxygen in your lungs, no breathing, probably might cause palpitation?

A I don't think so.

Q What is the other reason for palpitation?

A Hereditary.

Q Could it also be because of tension?

A But that's probably hereditary too; palpitation is a recurrent fear -- you'll be well once and have it the next time, that's what I understand it means here.

Q Now the second time, July 3rd -- chest pain and also sweating, would those kind of pains be consistent with a cardiac condition?

A Oh yes, they would be. Many symptoms you get from a heart attack; also other things will give you that.

Q If you were under tension you could get the same

feeling?

A Some people would.

Q It depends on our own makeup?

A I would say that's the way you explain it.

Q Now, besides reasons for having chest pain are many and most of them aren't necessarily cardiac in origin?

A No.

Q You just said tension; right?

How about if he had a bad cold.

A You could get chest pain from a cold.

Q If you were overweight, would you get chest pain from that?

A I don't see how.

Q Would you get chest pain from arteriosclerosis?

A That's hardening of the arteries; you may have.

Q And a man of Mr. Marrale's age, 48 or 52 or in-between, isn't arteriosclerosis a normal condition?

A I don't think you could -- one man 80 years of age may not have hardening of the arteries and a man of 48 may have.

Q If a man had it --

A If a man had hardening of the arteries, it usually shows up in x-rays.

MR. KORSON: There is no testimony in any of the medical records that Mr. Marrale had arteriosclerosis.

THE COURT: Could we bring cross to a close, please.

Q From your record, who told you Mr. Marrale went to Italy.

A He had a telephone number and if someone called there he might have told one of my assistants -- but we have a note that he went to Italy on the 28th. I saw him on the 27th of June.

Q Now, Doctor, will you look back in the Long Island College Hospital records on that same page.

I ask you for a discharge summary or diagnosis.

Did they prescribe any medication for him when he went to the hospital?

A They have written none, no medication. On the third page I believe that's the admission.

Q Is there some record there about his blood pressure?

A I think it's right down here, one fifty over one hundred.

Q Normal for a man his age?

A That could be normal for a man of his age if he

were so excited or if they were taking him to the hospital by ambulance. I think mine would go up; probably go down the next hour or so.

Q It indicates that it did go down.

A Down to 120.

Q Now, on the fourth page it says June 1st of '73, 9:10 A.M., there was a history here taken by a doctor, examination and history.

A We'll assume so.

Q Doesn't that say there on one of those first two lines, normal health 'til 11:00 P.M.?

A It says patient was in normal state of health until 11:00 P.M. last night when he developed chest pain and sweating and nausea, shortness of breath.

Q Does it say anything there, Doctor, of having been dizzy the previous day or having inhaled any fumes?

A I don't see anything at all.

Q Is there something there that says no previous history of palpitation?

A Well, I think it said no palpitation.

Q Further down it says "lungs clear to A&P."

A Anterior, posterior. You listen to one side -- P is for posterior -- listen to the back of the lungs -- A is

when you're facing him.

Q Is this by x-ray?

A No, that's listening with a stethoscope.

Q Is that the same type of exam you made?

A Yes.

Q When he was admitted to the hospital they found his lungs clear, same as you did two weeks later?

A Yes.

Q Now, on June 2nd under the doctor's notes, you have a history there of no coughing.

A What was the question there.

Q Did they find there no coughing?

A On what day.

Q I think it's June 2nd.

A June 2nd?

Q Yes.

A It's hard when you put these together to get the date, but I have here June 3rd. This must then be June 2nd. You want to know --

Q Is there a history there that he had no coughing.

A I think I see no coughing here; yes.

Q Now, somewhere near the end -- is that what the

doctor ordered to be done?

A Yes sir; these are the orders the doctor wrote on this date.

Q Now, didn't they order a local diet here some place? Twelve hundred calorie low something diet?

A Low sodium diet, no salt. That's a good diet for anyone overweight.

Q But it might apply here two ways.

A It could apply anyway you wish to.

Q It would be safe medical procedure?

A Good medical practice.

Q Now, Doctor, in response to Mr. Korson's questions you ran through the ILA records and there are a number of incidents, I think 14 or something where he said there was coughing.

MR. KORSON: Seventeen.

Q Did you go over these entries before you got on the stand to testify?

A I did; about five minutes, at least five minutes out in the hall.

Q The first entry here -- I think the testimony here is Doctor, the man came back from Italy on September 1973 and here is an entry October 29th, 1973.

A Yes.

Q He came into the clinic for some reason?

A It says acute respiratory infection, that's a cold.

Q And if you have an acute upper respiratory infection, your respiratory region could be infected?

A Yes.

Q Now, the next entry is January 25th, 1974, complains of head, chest, cold, cough.

A That's right.

Q He had a cold?

A I don't know what he had. I didn't write this.

Q Isn't that a fair assumption from that entry, sir?

A That's what these notes are. He came in with a headache, chestache or whatever it is. It just said "head, chest, cold and cough."

Q Did you tell us a pain in your chest could be consistent with having a bad cold?

A Could be.

Q So the next entry we go on to February 6th, '74, coughing, chest --

A Complains of chest oppression on exertion; complains of chest oppression.

Q He has pains in his chest.

A When he walks too much or walks too hard.

Q Would that be consistent with a cardiac condition?

A You could get it. I wouldn't say because a man had it he had a cardiac condition.

Q These complaints could be consistent with something other than irritation of the lungs?

A Yes, that's how medicine is unfortunately.

Q During all these entries that you're reading in here, complaints of cough, pains in the chest; did you ever find anything that ever related in the history back to breathing fumes?

A I haven't seen anything. I haven't run across anything.

Q To go through these entries one at a time, tell me which one relates to a cold and also was complaining of pain in his chest at the same time.

A No, I can't clarify for you. These are written by another person and we never know what the doctor has in mind. They are not too illuminating for a second doctor to

know what he's thinking of.

Q If you don't know what he's thinking of, just what he wrote down.

A Yes; coughed three days, some discharge -- not very clear.

Q Somewhere in your testimony here you mentioned that this patient was coughing up black sputum; is that right?

A I didn't mention that.

Q You read it out of the record.

A I was asked to read the record and I read it.

Q That's the Long Island College Hospital record?

A It's on one of these records.

Q Doctor, if you are bleeding in your lungs and you cough up blood, what color is it?

A It would be fumy bright red.

Q If this blood stays in your lungs it might turn black?

A It would turn black.

Q How long a period would it have to be in there.

A It all depends on the tissue fluid.

Q Give us an estimate.

A Could be a day.

Q Could it be more than a day?

A Could be less than a day.

Q How much less.

A I have no idea. I can't answer that.

Q Would it require at least 12 hours?

A I can't testify as to how long it would require. This man's blood congealed and turned dark; it's hard to estimate.

Q Did it turn dark because of a chemical process.

A It goes through a process. If the blood remains outside the veins the circulation for a few minutes -- 30 minutes, 50 minutes, it will come out black clots, whether it's from your lungs or --

Q Here it wasn't on the outside of the body; this came from inside.

A It turns black inside the body. It doesn't have to be out of the organs, it could be clogged in the organs.

Q Incidentally, your specialty is surgery, is it not?

A That's my training, surgery.

Q Do you have a specialty?

A Yes, general surgery.

Q And this treatment of lung condition is part of

1
2
3 your specialty?
4 A I have had some experience with that.
5 Q Is that part of your specialty?
6 A It's general surgery; yes.
7 Q Now, if an irritation is in the upper respira-
8 tory tract and is caused by breathing fumes, how long would it
9 take for a condition like that to heal.
10 A I can't answer, depends how much damage was
11 done.
12 Q But here you are listening to his lungs.
13 A When I listened to him, I found no abdominal
14 chest sounds.
15 Q If it were just an irritation, it would not
16 show up on x-rays?
17 A No, that wouldn't show up.
18 Q If it was serious enough to cause a lesion,
19 that would show up on an x-ray?
20 A If you could inject some substance in there
21 that would fill up the depression or irregularity of it, you
22 could see it. We don't have anything to do that in the lungs.
23 We do that with x-ray in the stomach.
24 Q When you x-ray lungs, people have had TB.
25 A They have had scarring.

Q And a scar is where something heals.

A That's right.

Q The x-ray taken of Mr. Marrale, any evidence of scarring or healed lesion?

A Will you ask that question again?

Q Any of the x-rays taken of Mr. Marrale's lungs, ever any indication of any healed lesions?

A I could only answer to the x-rays I had or did have. There is no scar shown there.

Q Back to the ILA records: There were four x-rays taken?

A Negative and no scarring.

Q They all say lungs were clear, no lesions.

A Free from any scars.

Q Doctor, a normal instance of a respiratory tract irritation, would it be healed in two weeks?

A From a cold?

Q From fumes.

A A cold usually heals about two weeks, I would say.

Q How about from fumes.

A From fumes I have no idea how long it takes.

Q Would it take three, four months?

A I couldn't answer it.

Q It can't take two, three years.

A I can't answer it.

Q Would a person such as the condition you described that was permanent, et cetera, would this person -- would this affect his work if he were a longshoreman who worked hard civically?

A I didn't understand your question.

Q You understand that Mr. Marrale is a longshoreman, he's a hole man, he works in a hatch; he does a great deal of physical labor. The condition that you described here, would this affect his work?

A Would it affect his work? If he had one of those episodes, I'm sure it would affect him enough to affect his work.

Q Would it cause him to be out of work on occasion?

A I don't know about that. It would cause him to go in the hospital one time -- and he had other episodes since.

Q That hospital entry you're talking about, the one we just read about the Long Island College record, you say there is no evidence in there that they treated him for upper respiratory infection?

A I didn't see any records.

Q Now, you said that your bill has not been paid; is that right?

A That's right.

Q Do you know why it wasn't paid?

MR. KORSON: Objection.

THE COURT: I don't think that's of any significance.

MR. DELANEY: If your Honor please, there is a significance.

THE COURT: If the cost was not responsible for this incident, it doesn't make any difference whether he paid them or not.

Thank you, Doctor.

(Continued next page.)

THE COURT: Go out to lunch, ladies and gentlemen and be back at ten to two. Don't discuss the case.

(Whereupon a luncheon recess was had.)

(After luncheon recess.)

(Whereupon the jurors entered the courtroom and are not seated in the jury box.)

THE COURT: Good afternoon, ladies and gentlemen.

All right, call your next witness.

MR. KORSON: I call the plaintiff back to the stand. We have a new interpreter.

THE COURT: Swear the interpreter.

(Whereupon Italian interpreter was sworn in by the Clerk of the Court stating her name as Paula Castellisi.)

(Plaintiff Antonio Marrale now seated in the witness box.)

A N T O N I O M A R R A L E , recalled as a witness having been previously duly sworn by the Clerk of the Court, further testified as follows:

DIRECT EXAMINATION

BY MR. KORSON:

Q Now Mr. Marrale, I've asked you in the first part of this trial most of the questions we are concerned with here, so I'm just going to ask you about some details now.

In the early morning hours when you were awakened from your sleep and an ambulance was sent for, how long did you have to wait for the ambulance.

A I don't remember, maybe an hour or two.

Q During that hour or two, what did you do?

A I was sitting down in a chair and I was in pain and I couldn't breathe.

Q Were you perspiring at all?

A Yes.

Q Was there anything else you could tell us about how you felt?

A I felt nauseous. I had pains, I was sweating and I was spitting like black stuff.

Q Were you frightened at all?

A Yes.

Q When the ambulance came, how were you taken from your apartment into the ambulance?

A The people that came to the ambulance they helped me out, they were holding my arms.

Q Were the police present?

A There were two police; one in the front of the car and one in the back.

Q Did your wife accompany you in the ambulance?

A Yes.

Q What did they do for you in the ambulance?

A They laid me down on the table inside the ambulance and they gave me oxygen to help me breathe.

Q Had you ever been given oxygen before?

A No.

Q Did you have any particular thoughts about that or feelings?

A They gave me that to help me breathe, but I was scared because the first time that I was taking it.

Q When you got to the hospital, what part of the hospital did they take you to?

A Emergency room.

Q What did they do for you in the emergency room?

A They laid me down on the table, they gave me injections. They put a machine with wires, a cardiogram, but he doesn't remember exactly.

Q If I may just tell the interpreter, use the word "you" rather than "he," so it's like Mr. Marrale is

speaking.

Did you remain in the emergency room for any period of time or were you admitted right away?

A The emergency room was in the hospital.

Q How long did you remain in the emergency room?

A I don't remember, maybe three or four hours.

Q From the emergency room, three or four hours later, where were you taken?

A They gave him an intravenous. After they gave him intravenous they kept the bottle on the arm and they took him to another room.

Q Were you still having trouble breathing?

A Yes.

Q Were you able to tell anybody what was wrong with you?

A I couldn't talk. I couldn't talk well because I was suffocating.

Q During the seven or eight days you were in the hospital, did you remain confined to your bed during that entire time or did there come a time that you could leave your bed before you were discharged.

A For the first four days. I couldn't get up because I had the bottle with something going in my arm.

Q When you were discharged from the hospital, did anybody at the hospital, a doctor or otherwise, tell you that you were fine?

A The doctor was telling me that you have to go to bed but I still felt terrible.

Q Now, we'll skip for the moment the treatment you received from Dr. Dunaway because we had this testimony this morning, and I'll ask you now about when you were in Italy.

What were your complaints to the doctor when you were in Italy.

A I couldn't breathe because I had a burning in my chest, I felt burning.

Q When you were treated by a doctor in Italy, were you treated at his office each time?

A Six times I went to his office; ten times he came to my home.

Q Why did he come to your home?

A I couldn't walk because I was out of breath.

Q Did you have your usual strength?

A Not as before because I was dizzy.

Q Since you returned to this country and started working again, how do you work with high-lows.

A Sometimes I do work, sometimes I don't.

Q Do you have occasion to work with a high-low at least once a week?

A It depends, it could be one time, it could be two, three times a week.

Q When you work with high-lows at the present time, does it have any effect on you?

A I can't breathe when I do work with high-lows.

Q Did you ever experience that before May 31st, 1973?

A No, never.

MR. KORSON: No other questions.

CROSS EXAMINATION

BY MR. DELANEY:

Q Mr. Marrale, when you left Italy to come back to the United States, how did you come back?

A Airplane.

Q How did you feel at that time?

A I didn't feel good.

Q Describe how you felt.

A I couldn't breathe well even 'til now.

Q Do you remember the date you got back, about the date you got back to New York?

A Either the 6th or 7th of September.

Q And you went back to work when.

A Eleventh or 12th of September.

Q In between the time you got back from Italy and the time you went to work, did you go to see any doctor at all about your condition?

A No.

Q Did you ever go back to see Dr. Dunaway again?

A No.

Q Now, the first time after you returned to New York, when you went to the ILA Clinic, what was wrong with you then?

A He said he couldn't breathe because of his chest and they were telling him that maybe it was a cold.

Q That maybe he had a cold?

A Yes.

Q Did your ears clog up?

A One time they did.

Q That was the first time, wasn't it?

A Yes.

Q Now, Mr. Marrale, I think you testified here two days ago that you used to smoke before this incident and afterwards; you haven't smoked since the time that theis happened in May 1973; is that correct?

A I don't smoke.

Q Have you smoked at all since May 1973?

A No.

Q Do you remember going to the ILA Clinic on March 1st, 1974 with complaints that you had chest pains when you were doing exercise and when you were doing work?

A I remember I went to the clinic, but I don't know whether it was in '74.

Q Do you remember that you told the doctor that you smoked one pack of cigarettes a day?

A No.

Q Mr. Marrale, when you were admitted to the hospital early in the morning on June 1st, how did you feel in the afternoon of June 1st.

A I felt the same like in the morning, I felt terrible.

Q Did you fe. nauseous?

A Yes.

Q Did you eat any dinner?

A I think I had some broth, but I don't remember.

Q Remember telling the nurse that your appetite was good?

A He said I didn't have no appetite, I couldn't

1
2
3 even eat.
4 Q Do you remember that night your appetite being
5 good also?
6 A In the hospital you're referring to?
7 Q Yes.
8 A Maybe I had a little soup, but that was it.
9 Q Do you remember your appetite being good
10 everyday when you were in the hospital?
11 A I was eating whatever they gave me.
12 Q Excuse me?
13 A I was eating whatever they gave me in the hos-
14 pital.
15 Q Now, Mr. Marrale, I think you told us two
16 days ago that the first time you ever had any pain in your
17 chest was after this incident; is that correct?
18 A It was not pain; it was that I was suffocating;
19 I was out of breath.
20 Q Did you hever have a pain in your chest for
21 any reason before May 31st, 1973?
22 A No.
23 Q Do you remember going to the ILA Clinic in
24 June, July of 1972 complaining about pain in your chest?
25 A I was going to the clinic.

Q Do you remember those incidents?

A I couldn't remember the dates, but I remember I was going to a clinic.

Q Did you have chest pains at that time?

A It's just that I was sweating because I was working hard, so I went to the clinic.

Q Do you remember an incident July of 1972 where you said you had chest pains two hours duration before you came into the clinic?

A I don't remember.

Q Mr. Marrale, I asked you two days ago to find your passport and bring it here. Were you able to find your passport?

A I couldn't find it.

Q You said since you got back to work, sometimes you work with a high-low, sometimes you have shortness of breath, can't breathe. You ever report that to the time-keeper?

A Sometimes I do, but sometimes we are so busy working I can't even tell him.

Q Did the timekeeper ever send you to a doctor?

A When I had the accident I did report it to him.

Q I'm talking about now, 1974, 1975, 1976.

A I didn't tell him anything.

Q Now Mr. Marrale, while you were in the hospital for seven, eight days, did you talk?

A After four days I started to talk.

Q Did you tell anybody after four days that you had trouble breathing because of the fumes?

A I told them; I don't know if they understood me, but I did tell them.

Q Now, what was the nationality of your doctor at Long Island College Hospital.

A I don't know.

Q And you say you told him when you left that you weren't feeling well?

A I told him but he told me that I was fine.

MR. DELANEY: I have no further questions.

THE COURT: Thank you very much.

Any thing further for the plaintiff.

MR. KORSON: I have one other stipulation to tell the jury.

Mr. Delaney and I have agreed that the reasonable value of the bill for the x-rays Dr. Dunaway had taken was $20.55.

That is the plaintiff's case.

THE COURT: Any defense testimony?

MR. DELANEY: I would like to offer Mr. Marrale's income tax records for the New York Shipping Association for the year '72 through '75.

THE CLERK: May I have it, please?

Defendant's Exhibit A marked in evidence.

THE COURT: Is it "A?"

THE CLERK: Defendant's Exhibit F, so marked.

THE COURT: Do you have any further witness?

MR. DELANEY: No.

THE COURT: You are resting?

MR. DELANEY: Yes.

THE COURT: Will you excuse us, please.

(Whereupon jurors were excused from the courtroom.)

MR. DELANEY: At this time I would like to move to exclude from evidence all the claim that relates to the period of treatment in the Long Island College Hospital on the ground that there is no medical proof that this period of treatment in the hospital in any way relates to the claim here which is that this man breathed fumes while working in a hatch and became ill as a result thereof.

The plaintiff's own doctor testified he examined

these records. There is nothing in them which relates to complaints of or treatment for any respiratory inflammation and that which Dr. Dunaway said this man suffered from.

It's conceded by the doctor that they treated him for a cardiac condition and found that he did not have one.

Consequently I move to exclude it from the jury's consideration; it has no relevancy to this case and also the hospital bill in relation to that period of treatment.

THE COURT: Denied.

Now, you have the proposed charge which is Court Exhibit 1A.

THE CLERK: Proposed charge is marked Court Exhibit 1A.

THE COURT: The only charge that I've made thus far. If you look at page three in the second full paragraph it says "defendant's doctor testified --" cross that out because we didn't have defendant's doctor, and I'm adding the x-ray bill $20.55 for x-rays.

Now, will you take five minutes, gentlemen, and take a look at it, it's a very short charge and

then we'll have summations. I would like to get this case finished today.

MR. KORSON: I have no objections, your Honor.

THE COURT: Well, now, do you want to take out a future loss of earnings?

MR. KORSON: As far as future loss of earnings, the doctor did testify it's a permanent condition and the man is exposed to fumes all the time and it's a late period in his life, I think he will lose earnings.

THE COURT: You want it in.

MR. KORSON: Yes.

MR. DELANEY: Defendant's Exhibit F shows his earnings; he has worked more hours than he has since the accident than he did before. The man is working not less but more; and I think it's conjecture that -- he has not lost income to date.

THE COURT: I'll take out the paragraph beginning at the bottom of page three.

MR. KORSON: There are portions in the ILA Clinic record which are in evidence that when he has had these coughing problems he has missed time from work, although the hours maybe increased from the Shipping Association.

MR. DELANEY: Mr. Korson, I think it says that

he has had --

THE COURT: Let me see the record.

MR. KORSON: I'm looking for it now, your Honor. March 31st entry, off three days, I'm sorry -- rain today, no work.

THE COURT: All of the bottom of page three, all of page four -- are you going to set the specific amount in your argument -- I'll leave that in.

Since there is no future loss of earnings, we don't have to put in this confusing bit about computation, so the paragraph beginning at the bottom of five all comes out to the top of six.

MR. DELANEY: The incident of May '73 -- on the first page, your Honor, talking about an aggrevation --

THE COURT: I thought that was your claim.

MR. DELANEY: No, I'm sorry.

THE COURT: I'll take it out.

MR. DELANEY: If I've misled you that was not my intention.

MR. KORSON: I think there is evidence that the jury can conclude there was aggrevation. The doctor testified as to the prior similar symptoms and he couldn't state whether or not there was such a

relationship.

MR. DELANEY: He didn't know, and I don't think that's enough either. If this man like he had asthma or something like that, it could be an aggrevated claim like that. He had two prior incidents, sweating and pains in his chest.

THE COURT: What do you want me to take out.

MR. DELANEY: The sentence about aggrevation pre-existing.

THE COURT: I thought that was your claim.

MR. DELANEY: And take out the word "further" --

THE COURT: The last two sentences of the last page, I'll take it out.

MR. DELANEY: I don't object to your Honor's saying that he should be compensated.

THE COURT: I'll take out the last two sentences.

MR. DELANEY: Fine, thank you.

THE COURT: All right, bring in the jury.

MR. KORSON: Your Honor, I would make a request of your Honor to include the charge for future loss of earnings.

THE COURT: No, it's not enough evidence.

(Whereupon jurors entered the courtroom and are

now seated in the jury box.)

MR. DELANEY: Your Honor, Mr. Korson, and Madam Forelady and gentlemen of the jury:

Once again, we have an opportunity to talk to you, and I won't repeat what I said the first time 'round.

What we are dealing with now is what responsibility, if any, does this defendant, does this shipowner have or Mr. Marrale claims happened to him, his medical treatment in his period of disability. I have no reason to doubt Mr. Marrale's story. Sometime around 11:00 o'clock he developed pain in his chest and he had difficulty breathing. An ambulance was called, he said he had to wait sometime, I'm sure that's true. They brought him to the hospital. He came in there and he thought he was having a heart attack. You don't have to take my word for it; you have the record right here, it's Plaintiff's Exhibit 1; but more so than that, Dr. Dunaway testified and Dr. Dunaway said that's what they treated him for. He's a doctor; that's his business; so he said that's all he was treated for there; and I asked him to look through and see if he could find any mention that Mr. Marrale either complained about having breathed

fumes or having lung irritation or that they treated him for that. He said there was none.

I submit to you, there isn't any -- and you could read it and look at every page. Now, Mr. Marrale, I don't doubt his condition on there, and the record clearly shows he thought he had a heart attack and they treated him for it. They put a monitor up to him and checked him very carefully. They were afraid something was wrong but he soon recovered. He responded to the medical treatment, whatever was wrong with him he responded. Right after that there is a section, nurse's notes. Nurse's record they call it. It starts at the last four pages. You could take this in, you could read the first entry, "appetite good." Then, during the night"slept well, during the day appetite good." They say he's"still on respiratory unit, no acute distress during the P.M." These are the nurse's notes. I don't know if any of you were ever in a hospital and I hope you never are. If you have you know nurse's come around and check you periodically at least once, a period of working time; so you could look in here.

I submit it's not just that instance but other instances. There are two stories here and I know if

all were standing in the Court House and we saw an accident, someone was hit by a car, we all would say something different happened. We are different people and this is normal because if all of us saw the same thing something would be wrong, or we would have to be standing in the same spot thinking the same thing at the same time. But the record here are records kept by doctors and various other people. At the time they write these things down, they have no idea what they are writing down is going to be concerned with a lawsuit or anything else, and their job is to note down certain things.

(Continued next page.)

MR. DELANEY: Now, at a time almost four years after this incident, those records, I think clearly reflect what happened or didn't happen, and it's two stories that these records reflect. Before we get into that, the plaintiff's claim here, as I understand it, he's not claiming he had a heart attack as a result of this incident, he's claiming that his respiratory tract, which is the lung leading into it were aggrevated or inflammed from this incident. I submit that the period while he was in that hospital has nothing to do with this incident. It had just fortuitously intervened in here. He had some kind of a cardiac arrest, some kind of problem, physical problem that night.

Now, the doctors couldn't find out what it was. I hope it wasn't a cardiac condition, but nevertheless, something happened and the doctors in no way related to this breathing fumes, and I'm sure if it had been it would be in the record. It wasn't just the initial entry into the hospital where apparently Mr. Marrale gave a history. There was a subsequent interview which Dr. Dunaway read from 9:10, I believe that's when he got into the room. It says doctor's records and it's in the doctor's handwriting, third or

1 fourth page and it says "patient in normal status and
2 health until 11:00 P.M. last night." It goes on
3 describing his other conditions, his other complaints.
4 I submit to you that's what happened to Mr. Marrale.
5 He didn't feel sick in the hatch; he didn't feel dizzy
6 down there or he would have done something down there.
7 He left there, came home, had his dinner and he went
8 to bed and sometime later he woke up with this pain and
9 these other conditions. He was taken to the hospital
10 and he was treated for it and when he left the hospital
11 they said his condition -- they didn't find anything
12 wrong with it. They didn't advise anything -- that's
13 on the second page where they call it discharge summary.
14 Dr. Dunaway read it, they found nothing wrong with him.
15 They said their diagnosis "chest pain idiology," which
16 means like a diagnosis -- question mark unknown --
17 they didn't know what was wrong with him.
18 He testified here about his condition. The
19 history in there is not consistent with anything that
20 he's testified to here as to what caused his condition.
21 Now, the next incident we have in the record
22 is when he went to see Dr. Dunaway. Dr. Dunaway
23 conceded that Mr. Marrale was sent to him by
24 Mr. Fortunato, who otherwise was unidentified here, but
25

he recommended Mr. Marrale, he was sent to him; that he sometimes sent histories and Dr. Dunaway doesn't speak Italian and neither does the lady who wrote down the history. Dr. Dunaway also said when he examined Mr. Marrale he found nothing wrong with him but he concluded something was wrong with him because of the history. He listened to the lungs and found nothing was wrong, that's the only way he could find that this man had this condition. You can't look in your mouth down into your lungs obviously. He also sent him for an x-ray; it came down lung field clear. There was nothing, what we call objective. If you have pain, that's objective. When you feel it you know you have it; when somebody else can see it that's subjective. When somebody says, I have pain, you have no way of knowing that I have pain or anything else; so Dr. Dunaway's entire treatment was medicine, sleeping pills. You could call them sleeping pills, call them something else, but gave him some sedatives. He gave him a sedative and he told him to go home and rest and he saw him six, seven times and then Mr. Marrale went to his physician.

Mr. Marrale is still insisting that he doesn't have chest pains. On the first page, they couldn't

1 determine what was wrong with him, but that time he
2 came into the ILA Clinic, they tested him and they
3 also took x-rays and there are three separate kinds
4 of records. They examined his lungs and found nothing
5 wrong with him. He said he never had these chest
6 pains but the record doesn't say. He said he doesn't
7 smoke; there's a record of March 1st which says he
8 still smokes a pack a day. Dr. Dunaway went through
9 those records and Mr. Korson will show in the different
10 entries -- "oh, here's another thing on pain" -- but
11 what he didn't do was read the entire entry. I have
12 a list of them and I'm not going to read them to you;
13 it's that long, but you can read them and they start
14 with a first entry October 1973 Mr. Marrale has ears
15 clogged up and had a cold, that's why he went to the
16 clinic. That's the first time after he came back. If
17 he was sick and disabled in Italy, he was sick and
18 disabled when he got home; wouldn't it be reasonable
19 to go back to the doctor or go to the ILA Clinic? He
20 first went almost a month after he went back to work
21 because he had something wrong with his ears and he
22 had a cold. Did you ever have a cold? You know some-
23 times your ears will clog up. When did he next go?
24 Three months later. What did he have: A head cold,
25

chest cold, a cough with it, which I submit is a normal thing. You have a head cold, chest cold, you have a cough. If you read these entries everytime but once from January 23, 1974 'til the last entry, which is the end of 1976, December '76, all but two entries. In regard to a cold Mr. Marrale was there for a cold, and ear infection; one time he hurt his ankle; he went there for his eye, he hurt his eye, but these instances don't indicate that. I submit Dr. Dunaway's testimony at best is a little incredible.

Mr. Korson when he gets up, he's undoubtedly going to jump on the fact that I introduced the doctor. Well, Dr. Dunaway is the only doctor that saw this man other than the hospital record, and I would also like to point out to you, I don't have the burden of proving anything here, it's his job, and I don't have to bring anybody here to say what was wrong with this man. When the man started the lawsuit he was back to work; there was no reason to send him to a doctor. I have no competent medical proof as to what was wrong with him.

There is also a claim here about the man's earnings. The last exhibit offered, Exhibit F, which you can read, breaks his earnings down by quarters. It

1
2 does it by amount and hours of work. You could look
3 at this, you could see since his period of disability
4 Mr. Marrale has not only worked but he has worked
5 more hours. He is also making more money and that's
6 because the pay raise has gone up. He has worked some-
7 times considerably more hours than he did before. And
8 it isn't consistent with his claim that he is disabled
9 here or some permanent damage to him. I ask you not
10 to forget your own experience in life -- and you had
11 a chance to see Mr. Marrale -- and also in the back
12 of the courtroom, does he look like he's a disabled
13 man to the extent that in the future he can't work now
14 or he's going to have a problem? I submit that he
15 looks as healthy as I am or anyone of the rest of
16 us.
17 There's a claim here for loss of wages -- first,
18 I am not contesting if you decide that this man is
19 entitled to lost wages that he wasn't in someway under
20 a doctor's care through the end of June, and I submit
21 that he is entitled because if you find that I am
22 responsible for his disability -- responsible -- I'm
23 responsible for that period which is a month, and I
24 conceded that he in the previous year averaged $240 a
25 week, that averages out to $968.

Mr. Marrale claims beyond that for the next two and a half months I am resonsible for the time he was in Italy. He says his wife's mother was ill; he went there. He also tells us while he was there, he was treated with some kind of injection; I don't know what for; none of the doctors treated him there for injection any more than the x-rays show that he was normal. I don't doubt that he was complaining that he had made a lot of complaints, that doesn't mean that there was anything wrong with him. If anything was wrong with him, it's my responsibility; it's my responsibility. Although I've conceded that he earned $240 a week, by simple arithmetic, even if you decide that I am responsible for the whole period he was out of work, add up his earnings for this period and I think it shows that he lost something like $2600. What is the difference? The difference, holidays and vacations, I don't know, but there is a difference and you can see what he actually lost here during this period. You look in the period 6/30/73, 9/30/73, turn to the year before and even the period before and you could see the total amount was approximately $2600, more or less; the other amounts claimed are the doctors' bills.

Two days ago I said at the end of summation there might be things I left out and there were somethings that I left out and there might be somethings that I forget, and I'm not asking you to act as the attorney for the shipowner; I'm asking you to review the testimony you hear, if he raises some point about what is or is not in the record.

I wish to thank you for a second time for your kind attention. I'm glad for your sake and ours this wasn't any longer and thank you very much for your time and attention, and I hope that you render a fair and reasonable verdict. Thank you.

THE COURT: Mr. Korson, I don't like to limit attorneys, as you know, but I have a 3:30 conference and I want to charge and give it to the jury.

MR. KORSON: I'll do my best, your Honor.

Your Honor Judge Weinstein, Mr. Delaney, Madam Forelady, ladies and gentlemen of the jury: You have done half of your job, you have fulfilled half of your responsibility, you have determined this shipowner is liable, at least in part for what befeld Mr. Marrale; and now you have a much more difficult job. You have to put into dollars and cents what Mr. Marrale has gone through as a result of this and

1 what he's going to go through in the future if you
2 agree that he is going to suffer.
3 The testimony that has come in has been simple
4 and it's been clear; it's only come in from me, so
5 all you have to do is read it, evaluate it, draw what
6 inferences you want from it. Mr. Marrale was admitted
7 to the hospital with the symptoms of a heart condition,
8 but the hospital records show that he has no history
9 of a heart condition, no history of hypertension,
10 high blood pressure. After he was discharged from
11 the hospital by two, three, four, five, whatever number
12 of doctors saw him at the hospital, not one concluded
13 that he had a heart attack or heart condition. The
14 final diagnosis is that he had chest pain in idiology.
15 It doesn't mean diagnosis; it means cause unknown. The
16 reason it's unknown is at no time was Mr. Marrale
17 able to tell anybody in the hospital, at no time did
18 anybody tell anybody in the hospital in English about
19 what he had been exposed to the day we are concerned
20 with here; so without that history, all the doctors
21 in the hospital were unable to ascertain what was
22 causing it. There is no question he was awakened in
23 the middle of the night unable to breathe; he had to
24 wait for an ambulance, thinking, God forbid, that his
25

1 life may be taken from him; being taken in an ambulance
2 with his wife accompanying him and an oxygen mask put
3 over his face, having an IV put into his arm, which
4 is standard procedure. The reason they do that is so
5 that they could have the vein open; anything they have
6 to inject him with, his vein is open and available for
7 medication.
8 What happened to Mr. Marrale? The record
9 speaks for itself. I'm not going to go over it, but
10 when Mr. Delaney asked the doctor, how Mr. Marrale was
11 when he was discharged from the hospital, we see on
12 the page that he was referring Dr. Dunaway to four
13 possibilities, discharge summary: He could have
14 expired; he could have left the hospital unchanged;
15 he could have left the hospital improved; or, he
16 could have left the hospital with an uneventful recovery.
17 What did they show -- improved. He wasn't in good
18 condition; he wasn't the way he was before this day.
19 If all these doctors who saw him suspected a cardiac
20 condition, when he left, number one, would he have been
21 discharged; and number two, would they have not told
22 him, you'd better come back to the clinic or go see
23 a coronary—pulmonary physician. You don't come out
24 of a hospital in six days and not told to seek further
25

medical attention, so I think we could discount that as pure nonsense. The man had a respiratory problem, that's all he had, and none of the doctors know that he was subjected to those fumes all day.

Mr. Delaney says: Give Mr. Marrale his one month loss of earnings while he was seen by Dr. Dunaway, but he said the treatment by Dr. Dunaway was necessary. Don't believe the treatment was necessary for this incident. Mr. Delaney asked Dr. Dunaway if it's normal in a 48-year-old man -- don't you expect to have arteriosclerosis, hardening of the arteries? Use your common sense. Mr. Delaney had every right to have any doctor of his own choosing examine Mr. Marrale and see what was his problem, what was the extent, and he had a right to have such a doctor come to court, and he never exercised that right. Use your common sense; why?

You have seen what Mr. Marrale is like; he looks like a bull; he's a proud man; he's not an intelligent man; he always worked with his hands, and he has a great difficulty with the English language.

Now, what was done to this man, he was subjected to a loss of an ability to breathe normally. I don't know what could be more frightening than that. He was

taken from his house in the middle of the night, from an ambulance to a hospital. The day before he was exposed to all these fumes. It was not just carbon monoxide, but there were other ingredients that could damage the respiratory membrane. He was kept in a hospital for one week. This pround man. He was confined to bed with an IV. He was unable to leave the bed three or four days and finds himself unable to breathe and being treated in this manner by a hospital. At the end of the week he was able to leave the hospital, he went home. He couldn't work. He remained at home for some five days or so. Dr. Dunaway obtained a history, he doesn't know who he obtained the history from. He said the girl who made the notes doesn't speak Italian. The history he got is exactly what we learned two days ago from the history and the record, even for Mr. Marrale. He treated him with medication, and on June 28th, which was the last time he saw him, he felt he still needed treatment. Being a longshoreman is not just going down to the pier, reporting to work, and sticking your hand out and getting a paycheck. You have to climb up and down 20,30 feet of ladder; you have to climb on top of cargo; you have to be able to lift things. Obviously he was

incapable of doing it.

Mr. Delaney would like to capitalize on the fact that he could have worked then. He couldn't work then. He saw a doctor in Italy and he had x-rays of his chest taken. Where did they x-ray, his chest. Mr. Delaney would give us the $20 and the $76 for Dr. Dunaway's bill. The out of pocket expenses that Mr. Marrale suffered came out of here (indicating) but Mr. Marrale's health will never be the same. He has to expose himself to these fumes all the time; a condition if treated and left alone and not exposed to fumes anymore -- if it didn't clear up in three or four months completely I would be shocked, but he has to go back to a job where he's exposed to these fumes whenever there is a high-low in a hatch.

(Continued next page.)

lows

MR. KORSON: There is a high-low in the hatch one, two, three times a week, so that condition is not left alone. It's aggrevated all the time and it's not something you could see on x-rays. They can't inject dye into the lungs as Dr. Dunaway told you, and his condition is going to get worse as he gets older. It's your common sense that counts. Thank God he's been able to work until now and he's worked more hours. You could see the number of hours he works, some quarters he works more, sometime he works less. A longshoreman doesn't have a 9:00 to 5:00 job, a 40 hour a week job, he works when there is a ship in, when they need his gang. When he's busy he works more. He tells you we didn't need those Shipping Association records; when there is work available, I work. He's lost for the period he's been out -- nobody said -- came out of his pocket $242 a week for 15 weeks; that's $3600 out of his pocket. He has a hospital bill of $1125. He has a doctor's bill. He has the doctor from Italy that he already paid $100 for 10 house calls and six office visits; and he has a $76 bill for Dr. Dunaway and a $26 bill for the x-ray doctor; that's $4,951 out of his pocket. That's the small part of this case.

The hard part of this case is what Mr. Marrale is entitled to. Now, you have to compensate him not only for the three years six months when this took place, but what you reasonably expect he's going to face for the rest of his life.

His Honor will charge you with what Mr. Marrale's life expectancy is. He may live more; he may live less. He has a life expectancy of some 22 years. You have to decide what he's going to be like 10, 15 years from now and how his lungs will be. He can't speak English; he doesn't have a college degree and he can't get a job elsewhere. That's why he's got to work. He has a wife and family he must support. We don't ask you for sympathy; we ask you to compensate him for what his lungs are like. I don't know how you're going to evaluate it.

When Mr. Marrale has some difficulty breathing some 15 years from now he can't come back to you and say you made a mistake. Whatever amount you give him -- I'm not going to tell you how much that amount is. I ask only that you give him back $4951 that came out of his pocket. What he's gone through for the past three years ten months and what he's going to go through in the future; it's worth 40, 50, $60,000, I

have no idea, only you can say, but do what you did during the first part of the trial.

Base your decision on the evidence, the testimony, what you have, not what you don't have and you will have rendered justice to this man.

Thank you.

THE COURT: Thank you.

I had explained to you earlier about impartiality and burden of proof and credibility, and all of those other matters. I'm not going to repeat it over again. The issue for you today is how much, if any, damages the plaintiff here suffered attributable to the inhalation of fumes from the high-low machine in May of 1973. Don't speculate. Only the damages actually proven should be included, but you can draw inferences, of course, from what you've heard.

Damages due to any other condition may not be included; so if he had any pre-existing disability, don't include damages for that, just the damages arising from this particular incident.

The plaintiff has the burden of proving the monetary value of the damages suffered. He is entitled to recover from any medical expenses he incurred for his loss of earnings for pain and suffering and for

future pain and suffering.

The plaintiff submitted evidence of medical expenses. You have to decide what portion, if any, are attributable to lung damage from the fumes. You should also take into account the earnings plaintiff lost from absence due to inhalation of these fumes.

Plaintiff claims a loss of 15 weeks. Both sides stipulate that Mr. Marrale's average weekly earnings amount to $242 per week. Don't speculate; but, you can determine from what you heard and what has been stipulated.

The defendant claims that plaintiff was not working because of his own choice when he was in Italy, and that his other absence from work was at least in part not due to the incident in May of 1973 in the ship's hole. The argument is, and I think you've heard it -- as I understood the argument, but you would appreciate it better than I would, he's willing to concede the prition of lost earnings up 'til the time the plaintiff left for Italy.

Dr. Dunaway is an expert. I explained to you about expert testimony to the degree of Mr. Marrale's injuries, the amount of personal damage he suffered and to the cause as he concluded.

There was evidence of total medical bills for $100 in Italy; $76.93 for visits to Dr. Dunaway; $20.55 for x-rays; and $1,125 for hospital bills. The defendant claims that these bills, at least in large part, were not due to the incident of May 1973 in the ship's hole.

In determining future damages for pain and suffering and loss of lung capacity, you should consider that the plaintiff is 51 years old, and he has a life expectancy of approximately 22½ years; that's based on statistics and they are just averages, but you can consider that in with all your experiences in life; the plaintiff's habits and what you observed about him, and his employment, and what his life expectancy will be.

Plaintiff claims past and future pain arising from the accident. The defendant claims that no future pain can result from the accident. In his summation, the plaintiff has suggested a specific amount that should be awarded to the plaintiff. These dollar figures do not constitute evidence. They represent the argument of counsel, and you are free to accept it or disregard it as you see fit, because your damages, if any, as you compute them have to be

based on the evidence.

Now, in reaching your verdict you should not, I emphasize the word, not determine only the amount of damages attributed to the -- you remember you gave that 50%, forget about that, that has nothing to do with you now. You should return a verdict which takes into account all of the damages suffered by the plaintiff as a result of the fume inhalation. Don't make any percentage computation; don't try to outguess; you just decide how much in money the plaintiff is entitled to or suffered damages as a result of that incident, that fume inhalation on that date.

Now, again, your verdict has to be unanimous; everybody has to agree.

Does counsel wish to see me at the sidebar?

MR. KORSON: No, your Honor.

THE COURT: All right, swear the marshals.

(Whereupon two marshals were sworn in by the Clerk of the Court.)

THE COURT: Give the jury pencil and paper.

Thank you.

Give them D, F and Plaintiff's Exhibits 1 and 2; they will have everything they need.

(Whereupon jurors retired to the jury room to

begin their deliberations.)

(Whereupon court stood in recess.)

(After recess.)

(Whereupon jurors entered the courtroom and are now seated in the jury box.)

THE COURT: Take the verdict please, Mr. Clerk.

THE CLERK: Madam Forelady, please rise.

THE FORELADY: We find for the plaintiff $73,000 plus salary for June and hospital expenses.

THE COURT: Give us the total.

THE FORELADY: The salary for June is $968 --

THE COURT: Why don't you do this, go back for a few minutes, take out your pencils and all agree on what the verdict should be. For legal reasons I think it would be better.

(Whereupon jurors retired to the jury room.)

(Whereupon jurors re-entered the courtroom and are not seated in the jury box.)

THE COURT: Mr. Clerk, will you take the verdict please.

THE CLERK: Madam Forelady, your verdict is for the plaintiff in what amount.

THE FORELADY: $75,000.

THE CLERK: Madam Forelady and ladies and

gentlemen of the jury, you say you find for the plaintiff in the amount of $75,000?

THE FORELADY: Yes.

THE COURT: Will you poll the jury please.

THE CLERK: You have heard the verdict as the Court has received it; yes or no is that your verdict juror number one.

JUROR NUMBER ONE: Yes.

THE CLERK: You have heard the verdict as the Court has received it; yes or no, is that your verdict juror number two.

JUROR NUMBER TWO: Yes.

THE CLERK: You have heard the verdict as the Court has received it; yes or no, is that your verdict juror number three.

JUROR NUMBER THREE: Yes.

THE CLERK: You have heard the verdict as the Court has received it; yes or no, is that your verdict juror number four.

JUROR NUMBER FOUR: Yes.

THE CLERK: You have heard the verdict as the Court has received it; yes or no, is that your verdict juror number five.

JUROR NUMBER FIVE: Yes.

THE CLERK: You have heard the verdict as the Court has received it; yes or no, is that your verdict juror number six.

JUROR NUMBER SIX: Yes.

THE COURT: Any reason why this jury should not now be discharged?

MR. KORSON: None whatsoever.

THE COURT: Thank you very much; enjoy your weekend.

(Whereupon jurors were excused from the courtroom.)

MR. DELANEY: I would like to reserve my motion.

THE COURT: I don't see why you need to reserve.

MR. DELANEY: I would like to think about it.

THE COURT: I would prefer you make your motions now. If you want to renew them you can.

I'd prefer to handle these motions while it's fresh in everyone's mind. It was a factual issue only. I'm not precluding you from submitting briefs, but I prefer to handle these matters while it's fresh in my mind.

MR. DELANEY: The defendant at this time would

like to move to set aside the verdict on damages on the grounds that it's clearly excessive because of the manner in which the jury started to give their verdict. It seems obvious that they gave him lost wages through July plus the hospital bill and they added this to a $73,000 amount; so that $73,000, the way I understand the verdict and your instructions would be for pain and suffering, past and future, and I think the nature and extent of the testimony in this case that's clearly excessive.

THE COURT: I don't believe it's excessive based on my observations of the plaintiff. I believe he has suffered very seriously and that he will continue to suffer seriously if you believe him. The jury obviously did believe him, that was a matter for the jury. Your motion is denied. The verdict will stand.

MR. DELANEY: The other motion will be for judgment notwithstanding the verdict, that will be addressed to the original verdict on liability only.

THE COURT: Denied, ample evidence to support the verdict.

Thank you very much. It was a well tried case, gentlemen.

MR. KORSON: Thank you, your Honor.

(Whereupon court stood in recess for the day in this matter.)

* * *

Due and timely service of ONE copies
of the within APPENDIX is hereby
admitted this 7TH day of NOVEMBER 197

.....
Attorney for APPELLEE

COPY RECEIVED
11/7 1977
IRVING B. BUSHLOW, ESQ.